United States Court of Appeals for the Second Circuit



APPELLANT'S BRIEF & APPENDIX

76-1497

To be argued by JAMES C. LANG

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appeller

-against-

DUDLEY D. MORGAN, JR.,

Defendant-Appellant.

P/5

BRIEF AND APPENDIX FOR
DEFENDANT-APPELLANT DUDLEY D. MORGAN, JR.



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PRELIMINARY STATEMENT

Defendant, Dudley D. Morgan, Jr. ("Morgan"), appeals from a judgment of conviction rendered after trial before United States District Judge Inzer B. Wyatt and a jury convicting him of mail fraud and the use of schemes and artifices to defraud in connection with the sale of securities in interstate commerce (Counts six through eleven, Counts fifteen through nineteen, Count twenty-one, Count thirty-three and Count thirty-four). On the 8th day of October, 1976, Morgan was sentenced to a term of two years. Due to his exemplary past history, Judge Wyatt ordered that he serve only two months in prison and remain on probation for the balance of the term. 3/

^{1. 18} U.S.C. \$1341 (1972); 18 U.S.C. \$1342 (1972).

^{2. 15} U.S.C. \$77Q(a) and 77x (1972); 15 U.S.C. \$78j(b) and 78ff (1972) and 17 C.F.R. \$240.10b-5.

Judge Wyatt stated at sentencing:

[&]quot;And if I were free to decide everything on the basis of my personal feelings, you would probably walk out a free man." (105A)

Timely notice of appeal was filed, and Morgan was released on his own recognizance pending the determination of this appeal.

Questions presented for Review

- 1. Did the trial court err in refusing to strike testimony or, in the alternative, failing to limit the use of testimony, which associated Morgan with the "Mafia" and the "Oklahoma Mafia"?
- 2. Did the trial court err in refusing to sustain Morgan's objections to the prosecutor's questions to Morgan's character witnesses which questions presumed Morgan's guilt?
- 3. Did the trial court err in refusing to permit testimony in support of the "good faith" defense raised by Morgan?

Statement of the Case

The indictment charges six defendants with mail fraud and with the use of schemes and artifices to defraud in connection with the sale of securities of the corporation Display Sciences, Inc. ("Display"). Defendants Victor Danenza ("Danenza"), Frank Dell'Aglio ("Dell'Aglio"), H. Cyrus Melikan ("Melikan"), Michael Brodsky ("Brodsky") and Triple Management, Inc., a New York corporation, ("Triple") were additionally charged with conspiracy to commit securities fraud.

Two defendants (Dell'Aglio and Melikan)

pled guilty to various charges and received probation

pursuant to a plea bargain agreement. (27A)

Defendant Danenza is presently a fugitive from

justice in France. The Government has not pursued

the prosecution against Triple. Defendant Brodsky

died after the indictment was returned and prior

to trial. Therefore, Morgan is presently the only

defendant before this Court.

Dell'Aglio, Melikan and Brodsky were all residents of New York or Philadelphia and operating officers and/or directors of Display. Danenza was a resident of New York and the alter ego of Triple. The indictment alleged that on or about March 20, 1972, Danenza and Dell'Aglio entered into a plan to raise money for Display by selling shares of Display registered in the name of Triple but actually owned by Dell'Aglio. The proceeds from the sales were used to pay the indebtedness of Display.

Morgan was the managing partner of Van
Alstyne Associates, Inc. in Tulsa, Oklahoma. The
gravamen of the securities and mail fraud violations
were omissions and misstatements allegedly made by
Morgan in connection with the sale of the securities
of Display to his customers in Tulsa. However,

Morgan and his family were large shareholders of Display and made purchases of Display during the period the alleged omissions and misstatements were made. 4/

Morgan had no connection with the actual operations of Display, and his defense was that he was not aware of the falsity of the facts alleged as misstatements or omissions as he received all of his information concerning Display from representatives of Display. Morgan further testified that if he were aware of negative information concerning Display, he and his family would not have invested over \$100,000.00 in Display during the period he was alleged to be making misstatements and omissions. (49A and 50A) Dell'Aglio testified that Morgan was aware of the facts and the issue became one of credibility. Morgan was convicted although he called numerous witnesses

^{4.} THE COURT: "Both sisters, which is a rather unique situation in a stock fraud case. I mean, going out and making money by selling to strangers through fraudulent means is, of course, a thing that arouses indignation. But to find that the alleged defrauder defrauds himself, and his mother and sister suffered frankly puzzles me." (103A)

who testified to his good character. The issue of his guilt was a close question. 5/

Dell'Aglio, who had previously pled guilty, was an important witness for the government. In response to a question from the court, Dell'Aglio suddenly injected an evidentiary harpoon into the case:

> "He [Morgan] indicated to me, he said, 'you know you have a Mafia up there, we have an Oklahoma Mafia here'." [Emphasis supplied.] (28A)

Defense counsel immediately requested that the response referring to the "Mafia" and "Oklahoma Mafia" be stricken, but this request was denied on the grounds that Morgan had purportedly made the statement. (28A) On cross-examination, defense counsel, faced with the devastating fact that comments associating Morgan with the "Mafia" and the "Oklahoma Mafia" had been admitted into evidence, asked if Dell'Aglio had taken Morgan's

^{5.} THE COURT: "I'm prepared to assume that you said you didn't know it [the omissions and misstatements], but evidently the jury concluded that you did, and of course that is a circumstance that is strongly inclined to guilt. But that isn't necessary to pursue because, regardless of what conclusion I might draw on the evidence, I emphasize that I have to accept the jury's verdict at this point." (106A)

statement about the "Oklahoma Mafia" as a threat, and Dell'Aglio testified that he ad not. (29A) 6/
Thus, any possible evidentiary basis for the admission of the testimony was eliminated.

In his closing argument, the prosecutor for the government vainly tried to clothe the prejudicial testimony with some cloak of admissibility. He only succeeded in emphasizing the prejudicial testimony in the following manner:

"... [H]e [Defendant] told Mr. Dell'Aglio on the phone, as Mr. Dell'Aglio testified, that there was an Oklahoma Mafia. Is there an Oklahoma Mafia? What did Mr. Morgan have to say to Mr. Dell'Aglio there is an Oklahoma Mafia? [sic] None whatsoever. Another example of his puffing and misstatements." (104A)

Despite defense counsel's repeated objections, the comments of the prosecutor concerning the "Mafia" and "Oklahoma Mafia" were presented to the jury with no cautionary instruction.

^{6.} The impact on the jury of the statements concerning "Mafia" and "Oklahoma Mafia" is clearly revealed in Dell'Aglio's own testimony:

Q. "Just right out he said that Oklahoma had a Mafia?"

A. I recall because I don't think it is something that anyone could easily forget."

[Emphasis supplied.] (29A)

MR. ROSENTHAL: "Your Honor, I want to note my objection to a small portion, which will take one second to Mr. Speiser's summation wherein he mentioned the Oklahoma Mafia. The only reason I didn't rise is because your Honor let it in evidence but I just wanted to preserve it for appeal, if necessary."

THE COURT: "I wasn't conscious of it. I must have been half asleep." (58A)

Morgan testified he had been an officer in the military for eight (8) years and a licensed stockbroker for almost twenty (20) years. Morgan introduced the testimony of five character witnesses to establish his good reputation for truth, honesty, and integrity. One of the instructions given by the court stated, in part:

"Evidence of good reputation for a relevant trait or opinion evidence as to such trait may in itself create a reasonable doubt where, without such evidence, there would be no reasonable doubt."

[Emphasis supplied.] (98A)

As the gravamen of the defense involved the question of credibility and good faith, the impact of the "Mafia" statements was decidedly prejudicial. On the good faith defense, the court instructed:

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"Now, members of the jury, since and [sic] essential element of the crime is a specific intent to defraud, it follows that good faith is a complete defense to the crime of mail

fraud. What I am about to say on the subject of good faith applies also to the securities fraud counts, counts 33 and 34, which I will discuss a little later in my instructions. However mis!eading or deceptive a plan may be the use of the mails does not constitute a crime if the plan was devised in good faith. Honesty and good faith on the part of the defendant is a good defense to the charge contained in all counts of the indicament. And [sic] honest belief by a defendant in the truth of the representation made is a good defense, however inaccurate the statement may turn out to be." (79A)

The gravamen of Morgan's defense was that any misstatement or omissions made by him were the result of information supplied by representatives of Display and that he had no reason to believe them not to be true. (51A-52A-92A) Part of the proof of this "good faith" defense was the testimony of other witnesses who also had received the same information from representatives of Display. One of these representatives was Henry McCarthy. (30A) However, each time counsel for Morgan propounded questions concerning whether Henry McCarthy had told a particular witness what Morgan claimed was told him, the prosecutor objected and the trial court sustained each objection (31A-32A-33A-34A-39A-43A-44A-47A-48A) An offer of proof was properly made by defense counsel. (40A-41A-45A-46A)

Not only was Morgan prejudiced by the trial court's refusal to allow him to present evidence which would prove his "good faith" defense, but also, when he presented his character witnesses, the prosecutor propounded questions to them and obtained answers which were highly prejudicial.

The prosecutor in essence asked the majority of the character witnesses if their opinion of Morgan would change if he had committed those acts charged in this indictment. (16A-17A-21A-23A) Each responded that it would: (55A-56A-57A)

PROPOSITION I

THE TRIAL COURT ERRED IN REFUSING TO
STRIKE WITNESS DELL'AGLIO'S TESTIMONY ASSOCIATING
MORGAN WITH THE "MAFIA" AND "OKLAHOMA MAFIA," OR,
IN THE ALTERNATIVE, IN FAILING TO LIMIT THE USE OF
THE TESTIMONY IN ANY MANNER, AND THE ERRORS
CONSTITUTED A DENIAL OF DEFENDANT'S RIGHT TO A
FAIR TRIAL AND TO DUE PROCESS OF LAW.

"Good Faith" and the "Mafia" are the antithesis of the other. The purported statement by Morgan concerning the "Mafia" or "Oklahoma Mafia" as testified to by Dell'Aglio was totally irrelevant to any of the issues in the case. The only possible reason for its admission into evidence would be to suggest that Morgan was in some way

connected with an organization known as the "Oklahoma Mafia." Although the prosecutor tried on closing argument to argue that the statement was another example of "puffing and misstatements" by Morgan, it is obvious that such a contention on the government's part was merely a "boot strap" argument by which the prosecutor belatedly attempted to place in the record some reason for the relevancy of Dell'Aglio's testimony.

The trial court allowed the introduction of the evidence and failed to strike it upon defense counsel's request based upon the sole reason that Dell'Aglio testified that Morgan had in fact made the statement. Certainly, it is true that relevant statements previously made by a defendant in a criminal case are generally admissible. However, it is also true that in order for the statement to be admissible, it must have at least some remote relevance to the issue being tried. The Phelps v. United States, 160 F.2d 868 (8th Cir.

^{7.} The simple fact that the witness is testifying as to what the defendant allegedly said does not make the evidence admissible. There are certain areas of testimony that are so prejudicial that they must be excluded from evidence even if they are sought to be introduced into evidence by the defendant himself! See Oliver v. U. S., 202

F.2d 521 (6th Cir. 1953), which was reversed due to the testimony of the defendant concerning a prior guilty plea which was withdrawn.

1947), reh. den., 161 F.2d 940, cert. den., 334 U.S. 860 (1948). In the present case the references to the "Mafia" and "Oklahoma Mafia" were not relevant at all and the evidence should have been stricken for that reason.

In the alternative, even if the evidence had any relevance or probative value, any such relevance or probative value was far outweighed by the prejudicial implications of the evidence. 8/Rule 403 of the Federal Rules of Evidence reads as follows:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time or needless presentation of accumulative evidence."

Morgan submits that any probative value of the references to the "Mafia" and "Oklahoma Mafia" was so substantially outweighed by the danger of unfair prejudice to Morgan that the trial court's refusal to strike the testimony of Dell'Aglio constituted reversible error and an abuse of the trial court's discretion.

In <u>United States v. Catalano</u>, 491 F.2d 268 (2nd. Cir. 1974), <u>cert. den.</u>, 419 U.S. 825

^{8.} Fn. 6, supra.

(1974), the government introduced evidence showing that the defendant used an alias when on a gambling trip to Puerto Rico. In considering the probative value this Court pointed out that the use of an alias could be a good method of hiding profits from the Internal Revenue Service. The Court then made the following statement:

"An allied argument raised by Dellacroce is that the prejudical implications of this evidence outweighs its probative worth ... certainly potential prejudice to the defendant is a factor to be considered in weighing the pros and cons of admitting a particular piece of evidence ... the lengthly dialogue between judge and prosecutor ... concerning this bit of evidence, the instruction to the jury at the time of its submission to them ... and the charge to the jury on this matter ... reveal the careful consideration given to the possibility of prejudice ... the probative worth of this evidence, far from being 'frivolous' ... was properly presented for jury consideration." U. S. v. Catalano, supra, at 273-274.

It is very interesting to contrast <u>Catalano</u> with the present case, for in the case at bar there was no dialogue or discussion whatsoever prior to the admission of the evidence, there was no instruction to the jury whatsoever concerning the evidence, nor any other statements to the jury in any manner limiting the effect of the evidence. Instead of the careful consideration given to the possibility

of prejudice . Catalano, the trial court apparently gave absolutely no consideration whatsoever to the possibility of prejudice in the present case. Indeed, the trial court at the time it overruled Defendant's motion to strike appeared to conclude that any statement of Morgan, no matter how low its probative value or how great its possible prejudicial impact, would nevertheless be admitted as evidence because Morgan reportedly said it! 9/
The admission of this highly prejudicial evidence represented a total disregard for the "balancing" function which the court must perform in snielding the jury from inflamatory and emotional evidence devoid of any probative value.

The trial court's apparent conclusion that the statement was admissible merely because Dell'Aglio testified that Morgan said it is without any foundation in the law. In <u>United States v. Birnbaum</u>, 337 F.2d 490 (2nd Cir. 1964), a government witness testified that the defendant had recommended an attorney who was to:

"[H]elp 'straighten out' a matter concerning [the witness'] Glade riew Corporation, then pending in the New York State Attorney

^{9.} Fn. 7, supra.

General's Office. The prosecutor asked if as a result of the representation by the attorney the matter was dropped. [The witness] replied in the affirmative, and said in addition that [defendant] had told him that the attorney was 'a very influential man and was an attorney with the Attorney General's Office'." United States v. Birnbaum, supra, at 496.

This Court held that the testimony was inadmissible and prejudicial, pointing out that it concerned unrelated, irrelevant matters not connected with the charge for which the defendant was being tried. Birnbaum certainly does not support the trial court's apparent conclusion in the present case that any statement of a defendant is always relevant and admissible.

In <u>Scott v. United States</u>, 263 F.2d 398 (5th Cir. 1959), a government witness testified in a prosecution involving a mail fraud scheme with regard to an overheard conversation between the defendant and a Mrs. Bard. The testimony was as follows:

"And Mrs. Bard said, 'You and King should be ashamed of the way you are dealing with these people'; and Mr. Scott [defendant] said, 'These people care nothing about me, and I care nothing about them'." Scott v. U. S., supra, at 401.

The Fifth Circuit held that the conversation in question had no connection with the charges in

the case and that it was "so inflammatory and so prejudicial that no amount of cautionary instruction could eradicate the impression of this testimony from the jurors' minds." Scott v. U. S., supra, at 401-402.

the trial court in the case at bar deliberately sought to elicit the testimony concerning the "Mafia" or "Oklahoma Mafia" from Dell'Aglio.

Indeed, there can only be speculation as to whether the prosecutor planned to use the starement in his case. However, the intent of the prosecutor or the court is totally irrelevant in any event. In U. S. v. Meagley, 239 F.2d 637 (7th Cir. 1957), the court makes the following comment in dealing with an unexpected prejudicial statement of a witness:

"...[t]here is nothing to indicate and no reason to believe that the government intended or expected the witness to answer as he did. At the same time, we are not able to discern how innocence on the part of government counsel mitigates the damaging effect which the statement was calculated to have on the minds of the jury and the rights of the defendant." U.S. v. Meagley, supra, at 638.

The highly prejudicial nature of references to the "Mafia" is illustrated by several cases.

In <u>United States v. Gerry</u>, 515 F.2d 130 (2nd Cir. 1975), references were made to "bookmaker," "made

man," and "fierce mob." Defense counsel contended that the use of the terms "bookmaker" and "made man" created an irresistible impression in the minds of the jury that the defendants were connected with organized crime. The trial court and this Court held that the references were too indirect and therefore nonprejudicial.

a "fierce mob" posed "a greater potential for prejudice than either 'bookmaker' or 'made man'".

U. S. v. Gerry, supra, at 139. This Court found, however, that the reference to "fierce mob" was permissible since it was introduced to refute the contention that a witness had merely been a victim of a "tout" scheme instead of extortion. In addition, the "rial court instructed the jury "that the testimony was to be considered only as it related to [the witness'] state of mind, not as evidence that any of the defendants was a member of any mob." U. S. v. Gerry, supra, at 139.

If the term "fierce mob" creates a high potential for prejudice, surely the terms "Mafia" and "Oklahoma Mafia" create a much greater potential for prejudice. In Gerry, the reference to "fierce mob" had some probative value since it showed the witness was afraid. In the present case, there

was no probative value at all. The witness did not consider the references to "Mafia" and "Oklahoma Mafia" to be a threat, and there was no probative value whatsoever with regard to the statement. In addition, there was no instruction given in the present case to limit the use of the testimory concerning "Mafia" and "Oklahoma Mafia" in any way. The jury was not instructed that the reference was merely used to show Morgan's state of mind or for any other particular purpose. Morgan, unlike the defendant in Gerry, was therefore faced with a direct prejudicial association with the "Mafia," which was not limited in its effect by any cautionary instruction.

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The extent of the highly prejudicial effect of the term "Mafia" is shown implicitly by United States v. Polizzi, 500 F.2d 856 (9th Cir. 1974). In that case, although defendants Polizzi and Cerilli were on a "Mafia list" and their purported connection with the Mafia was clearly relevant to the case, the prosecutor still avoided any reference to the Mafia links in the government's case! United States v. Polizzi, supra, at 888. On direct examination, Polizzi testified that he had a "problem" which prevented him from obtaining a certain license. On cross-examination,

the United States Attorney asked him what the problem was. Polizzi volunteered the information that the problem was that he was purportedly connected with the "Mafia." The court stated:

"Since the general nature of Polizzi's problem was directly relevant, and the prejudicial Mafia connection was volunteered by Polizzi, the trial court's ruling was well within its wide discretion in controlling cross-examination and in balancing its probative value against possible prejudice." [Emphasis supplied.] U. S. v. Polizzi, supra, at 889.

Polizzi cites U. S. v. Lazarus, 425 F.2d 638 (9th Cir. 1970), for the proposition that the use of the term "Mafia" is not per se prejudicial, and certainly there are cases in which the use of the term "Mafia" does not constitute error. Lazarus is an excellent example of such a case. The case involved a prosecution for perjury and the materiality of defendant's testimony before a grand jury. Part of the matter to be considered by the grand jury was an alleged connection between persons who attended a certain meeting and the "Mafia." Since the grand jury investigation involved organized crime, the court logically concluded that, since the jury knew the defendant was suspected of being involved with organized crime, it would hardly be more prejudicial if it

were known he was suspected of "Mafia" connections. In addition, one of the references to the Mafia in Lazarus was made by the government when defense counsel knew in advance that the word was going to be mentioned and did not object. Such a case is obviously distinguishable from the case at bar, both with regard to the relevance of the reference to the "Mafia" and with regard to the question of advance notice to the defendant.

Despite the fact that <u>Lazarus</u> held that the Mafia reference in the context of that case was not erroneous, the court said: "There may well be cases where reference in testimony linking the defendant to the Mafia may require the granting of defendant's motion [for a mistrial]." The court also referred to the Mafia reference as being "unfortunate." <u>U. S. v. Lazarus</u>, <u>supra</u>, at 641.

Most of the references to the "Mafia" have occurred in cases in which organized crime and the "Mafia" are actually involved. Indeed, in cases such as Lazarus and Gerry it is difficult to understand how the government could have successfully avoided any reference to organized crime. The present case, on the other hand, involves a defendant with no prior convictions who raised the defense

of good character. The irrelevant testimony of Dell'Aglio created the highly prejudicial indication that Morgan was involved with the "Mafia" or the "Oklahoma Mafia." 10/

The fact that Morgan relied, in part, upon testimony of good character and the "good faith" defense made Dell'Aglio's testimony even more damaging than it would have been in the absence of such circumstances. Morgan's evidence of good character was not rebutted in any manner by the government. The only negative information concerning Morgan's character which the prosecutor was able to uncover involved alleged arrests for public drunkenness, resisting arrest and assault in 1968 and for public drunkenness and assault in 1957. The government requested a conference at the side bar prior to cross-examining Morgan concerning these arrests. The trial court correctly concluded that testimony concerning arrests for such offenses would not be relevant. (53A and 54A)

If testimony concerning prior misdemeanor arrests for drunkenness and assault were irrelevant,

^{10.} It is apparent that Dell'Aglio's statement implicated Morgan with the "Mafia" or "Oklahoma Mafia," as the last sentence in the statement allegedly made by Morgan was "... [W]e have an Oklahoma Mafia here." [Emphasis supplied.] (28A)

ther surely association with the "Mafia" and "Oklahoma Mafia" was even less relevant considering the instruction that a specific character trait may in itself create a reasonable doubt, the jury was considering a man who, based upon uncontradicted testimony, had a good reputation for honesty, truthfulness and integrity. Any chance which Morgan may have had that the jury might consider his good prior reputation and his "good faith" defense as a sufficient basis for reasonable doubt was destroyed by associating him with the "Mafia" and "Oklahoma Mafia." These irrelevant references created the strong implication that, despite the evidence concerning good reputation, Morgan was associated with organized crime.

In view of the unrestricted admission of the testimony concerning the "Mafia" and the "Oklahoma Mafia," Morgan submits that he was denied his right to a fair trial and to due process of law afforded to him by the United States Constitution. Cases such as <u>U. S. v. Tomaiolo</u>, 249 F.2d 683 (2nd Cir. 1957), which held that references to the defendant as a "bad man" or to his association with criminal companions constitute reversible error, do not specifically deal with the constitutional

implications of the admission of such evidence.

It would seem clear, however, that the admission of such testimony constituted an error of constitutional proportions. It violated due process by doing away with the presumption of innocence, by allowing trial by prejudice, and by shifting the focus of the trial from the charges as alleged to Morgan's purported "Mafia" connections.

For the reasons set forth above, Morgan submits that he was denied his right to a fair trial and to due process of law by the trial court's instal to strike or otherwise limit testimony concerning the "Mafia" and "Oklahoma Mafia," and therefore prays that the case be reversed and remanded for a new trial.

PROPOSITION II

THE TRIAL COURT ERRED IN REFUSING TO
SUSTAIN MORGAN'S OBJECTIONS TO THE PROSECUTOR'S
QUESTIONS TO MORGAN'S CHARACTER WITNESSES WHICH
QUESTIONS PRESUMED MORGAN'S GUILT AND THIS ERROR
CONSTITUTED A DENIAL OF DEFENDANT'S RIGHT TO A
FAIR TRIAL AND DUE PROCESS OF LAW.

The prosecutor, in his cross-examination of the majority of the character witnesses who testified on Morgan's behalf, proposed a question in substantially the following form:

"Now, Mr. [witness], if
Mr. Morgan knew that Display Sciences
was in receivership at the time he
was selling these shares of Display
Sciences stock between May and July
of 1972 and didn't tell that to his
customers, would your opinion of
him change at all?" (55A; see also
56A-57A.)

Defense coursel objected to this question the first time it was asked, but the court overruled the objection, apparently on the grounds that the prosecutor had used the word "if." $(55A)\frac{11}{}$

In propounding the questions, the prosecutor made the assumption that Morgan had known and had caused to be omitted from disclosure to purchasers of Display common stock the fact that Display was in receivership at the time of the sale of the stock. By his questioning, the prosecutor assumed Morgan's guilt of the allegations contained in Paragraph 4(c) (1) and (2) of the indictment. (16A-17A) Morgan's knowledge or lack thereof concerning the receivership was a crucial issue in the case. Certainly it is permissible for the government to cross-examine a character witness by testing the sufficiency of the witness' knowledge by inquiring into the

ll. Defense counsel did not object to the essentially identical question propounded to subsequent witnesses since the objection would then have been futile as the trial court had already ruled. See Awkard v. U. S., 352 F.2d 411 (D.C. Cir. 1965), fn. 9 at 644.

nature of the information upon which he bases his conclusion as to a defendant's good reputation, and by requiring him to disclose rumors and reports which are abroad in the community. Michelson v.

U. S., 335 U. S. 469 (1948) In Michelson however, the United States Supreme Court also pointed out that both the use of character witnesses and their cross-examination should be strictly controlled by the trial court. A relevant comment in that regard was made by this Court in United States v.

H. Wool & Sons, 215 F.2d 95 (2nd Cir. 1954):

"As pointed out by Mr. Justice Jackson in Michelson v. U. S. [citation omitted] the procedure as to character evidence in criminal cases is in many respects an anomaly in the law of evidence, and courts should be on the alert to see that the practice is not abused. We may also add that it is incumbent on prosecuting attorneys to be scrupulous in not stepping out of bounds on this sort of cross-examination." [Emphasis supplied.] U. S. v. H. Wool & Sons, supra, at 99.

It is important to remember that the purpose of character testimony introduced on behalf of the defendant is to show that it is improbable that he committed the crime with which he is charged. <u>U. S. v. Minieri</u>, 303 F.2d 550 (2nd Cir. 1952), cert. den., 371 U.S. 847 (1962). Since this is the entire rationale for the "anomalous"

procedures followed concerning character testimony, it would indeed be paradoxical for the court to approve a question propounded by the prosecution to a character witness which assumes the defendant's quilt. If character evidence is probative at all, it is probative because it shows that defendant enjoyed a good reputation until the date upon which the alleged crime was committed. The idea that the prosecution can somehow "bootstrap" by saying, in effect, "Well, he won't have such a good reputation if he is convicted in this case, will he?" is illogical, irrational and patently absurd.

In the present case the prosecutor committed the error of assuming Morgan's guilt in his questions to the character witnesses, of forcing the character witnesses to assume Morgan's guilt, and of inviting the jury to assume Morgan's guilt. By not sustaining the objection of defense counsel, the trial court put his stamp of approval on this assumption of guilt. Such a procedure was not only totally without any valid evidentiary basis, but denied Morgan's right to be clothed with the presumption of innocence and thereby denied his right to due process of law.

There is no support for the prosecutor's proce are in this case either under existing case

law or under the Federal Rules of Evidence.
Rule 405(a) of the Federal Rules of Evidence
provides as follows:

"In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of supplied.]

There is no indication that the Federal Rules of Evidence were intended to change the old law as to what specific instances were in fact "relevant". The notes of the advisory committee on the proposed rules contained the following statement:

"According to the great majority of cases, on cross-examination inquiry is allowable as to whether the reputation witness has heard of particular instances of conduct pertinent to the trait in question. Michelson v. U. S., [citation ommitted]. The theory is that, since the reputation witness relates what he has heard, the inquiry tends to shed light on the accuracy of his hearing and reporting. Accordingly, the opinion witness would be asked whether he knew, as well as whether he had heard. The fact is, of course, that these distinctions are of slight if any practical significance, and the second sentence of subdivision (a) eliminates them as a factor in formulating questions. This recognition of the propriety of inquiring into specific instances of conduct does not circumcribe inquiry otherwise into the bases of opinion and reputation testimony."

From the language of Rule 405 itself and from the notes of the advisory committee, it is obvious that the only relevant considerations pertaining to cross-examination of a character witness are what the witness has heard about the defendant in the community and what his knowledge is concerning the defendant. Certainly, nothing in Rule 405 or the advisory committee notes give any support to the prosecutor propounding a hypothetical question which assumes the guilt of the defendant.

The precise question presented here has arisen in only a few jurisdictions. Morgan submits that the reason for the scarcity of cases on the subject is the obviously erroneous nature of the line of questioning pursued by the prosecutor. In Sexton v. State, 312 So.2d 71 (Ala. 1975), the defendant was charged with carnal knowledge of a girl under the age of twelve years. The prosecutor asked:

"Now let me ask you this. Would you think a man had good sense who would take an eleven year old girl out and have sex with her? Would you think anybody had good character if they did that?" Sexton v. State, supra, at 74.

The eventual answer by the witness was, "Well, I don't believe he would." Sexton v. State, supra, at 74. Based upon that question, the Alabama Court of Criminal Appeals reversed the defendant's conviction.

It will be noted that the question in Sexton was stated in hypothetical terms, since the prosecutor used the word "if." The word "if" was also used in the present case and was apparently relied upon by the trial court in overruling Defendant's objection. The present case seems indistinguishable from Sexton since in both cases the question assumed the guilt of the defendant.

An analogous situation was considered in Diggs v. State, 88 SW.2d 103 (Tex. 1935). In Diggs, the dialogue between the prosecutor and defense character witness was as follows:

"You heard about the shooting and killing of the [deceased] didn't you in December, 1934? Answer: Yes, I heard of it. Question: Would you say after hearing that he still has a good reputation for being a peaceable and law-abiding citizen? Answer: Not then, no sir." Diggs v. State, supra, at 103.

In holding that the question constituted reversible error, the court stated:

"In all criminal cases the defendant is presumed to be innocent, and the indictment against him should not be used to destroy that presumption of law, nor can the indictment be appropriated by the jury as any evidence of guilt; neither should the same be used to impugn his good reputation which he has established by many years of good conduct and obedience to the law. If it were otherwise, it would give weight to a presumption against him arising entirely out of the charge

contained in the indictment for which he is being tried. If the discussion of the charge contained in the indictment could be used as a basis for showing that a man's reputation as a law-abiding citizen was bad, then no man who was on trial could successfully show a good reputation as a law-abiding citizen." Diggs v. State, supra, at 103.

The language in <u>Diggs</u> seems particularly appropriate in the present case, since here the prosecutor clearly discussed a critical portion of the charge contained in the indictment in framing his questions to the various character witnesses.

In <u>Craft v. Mississippi</u>, 181 So. 2d 140 (Miss. 1965), the district attorney discussed in detail the crime for which the defendant was being tried and asked the defendant's character witnesses whether they would have a different opinion if they were reliably informed of the defendant's guilt for that crime. The Mississippi Supreme Court held that such questioning constituted reversible error.

In <u>Mitchell v. State</u>, 277 So.2d 395

(Ala. 1973), the prosecutor did not make an improper assumption of guilt concerning the crime charged in his questions to the character witnesses.

However, the Alabama Court of Criminal Appeals considered other cases in which the alleged facts of the crime had been incorporated into questions

to character witnesses and reached the following conclusion:

"The general rule which we can deduce from this line of cases seems to be that it is improper for the prosecuting attorney on cross-examination to ask defendant's character witnesses questions which assume that defendant did an act tending to prove him guilty of the crime charged." Mitchell v. State, supra, at 402. [Emphasis supplied.]

Certainly the prosecutor's questions in the present case were based upon assumptions that Morgan committed an act which tended to prove that he was guilty of the crime charged.

The identical point is also made in Broussard v. State, 114 SW.2d 248 (Tex. 1938), in which the court stated:

"It is true that a character witness may be asked on cross-examination whether he has heard that the accused had been guilty of specific acts of misconduct. However, questions based on alleged misconduct involved in the very transaction for which accused is on trial may not properly be propounded to character witnesses for the purpose of testing their sincerity. Appellant's objection to the question should have been sustained." Broussard v. State, supra, at 249. [Emphasis supplied.]

It might be added, that the objectionable question in <u>Broussard</u> was prefaced by the word "if," and the court in <u>Broussard</u> still concluded that the question was improper. Thus, the use of the word

"if" by the prosecutor in the case at bar does not serve to distinguish this case from Broussard.

In <u>Gaugh v. Commonwealth</u>, 87 SW.2d 94 (Ken. 1935), the defendant was charged with the crime of receiving and assenting to the receipt of a deposit by a bank at a time when he was acting as its cashier and after he had knowledge of the fact that the bank was insolvent. Evidence had been presented showing that he had withdrawn his own funds from the bank on the day that the deposit was received. The prosecutor questioned the defendant's character witness on cross-examination concerning the alleged withdrawal of funds by the defendant. 12/ The court held that the questions by the prosecutor were prejudicial and constituted reversible error. The court stated:

"Permitting the commonwealth to pursue the line of interrogation as above indicated on the crossexamination of character witnesses

^{12.} The two questions were as follows:

(1) "If you had known that afternoon that just before he took your little deposit he and his assistant cashier took from the bank in cash \$2,637.90, do you think that would have been your opinion or would ever have been as to his reputation for honesty in that community?" (2) "I asked you if you had known and the people among whom he associated had known that on that afternoon he and his assistant cashier had checked out of the bank that much money, and the fact that they did not open the bank for business any more, do you think that would have affected the people of that community, as to his morals?"

not only served to magnify this evidence [of the purported withdrawal of funds] but to use it as a weapon to utterly destroy the evidence showing his previous good reputation as to honesty and integrity. No case has been pointed out by counsel for the commonwealth, and we have found none, indicating that in the cross-examination of a character witness he may be asked concerning the particular offense of which the accused is charged or about acts in evidence to establish his guilt in an effort to impeach or break down evidence concerning his previous good reputation. This line of interrogation was in effect presupposing appellant's guilt and was asking the witnesses what the effect would have been upon their opinion and the opinion of the people among whom appellant associated if they had known that he committed the offense charged in the indictment. Our conclusion is that it was both incompetent and prejudicial." v. Commonwealth, supra, at 98.

Morgan submits that the procedure followed in cases such as <u>Gaugh</u> and in the case at bar, is not only improper and prejudicial but was in clear violation of Morgan's constitutional rights to a fair trial and to be cloaked with the presumption of innocence. Chief Justice Burger of the United States Supreme Court has recently discussed the presumption of innocence in <u>Estelle v. Williams</u>, 96 S. Ct. 1691, __ U.S. __ (1976). In <u>Estelle</u>, the actual holding of the Court was that a defendant who fails to object to being tried in prison clothes, and who cannot present sufficient reason

for failure to raise the issue before trial,
cannot complain that his right to be presumed
innocent was violated. However, the importance of
the presumption of innocence is stressed in Estelle:

"The right to a fair trial is a fundamental liberty secured by the fourteenth amendment [citation omitted]. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.... [T]o implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully quard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt [citation omitted]. The actual impact of a particular practice on the judgment of jurors cannot always be fully determined, but this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny [citation omitted]. Courts must do the best they can to evaluate the likely effects of a particular procedure based on reason, principle and common human experience." Estelle v. Williams, supra, at 1692-1693.

Certainly, a procedure which requires
that the prosecutor, the witness, and the jury to at
least temporarily assume the defendant's guilt is
a prejudicial procedure which is contrary in all
respects to the presumption of innocence. To
assume for the sake of the prosecutor's question
that Morgan failed to inform the prosecution witnesses

of the relevant facts and at the same time assume his innocence is expecting the jury to perform an impossible feat of mental gymnastics. The injection of the assumption of Morgan's guilt into evidence during the course of the trial is perhaps the most clear abrogation of the presumption of innocence which could ever exist. 13/

presumption of innocence was not violated by the prosecutor's questions in present case, there is another fatal defect in the questions. Professor Wigmore has pointed out that when questions are asked on cross-examinatio of defense character witnesses as to prior misconduct by the defendant there must be no question as to the <u>fact of the misconduct. 14</u>/ Certainly it is improper for a prosecutor to ask a character witness questions concerning the arrest of a defendant if the prosecutor has no facts available which establish that the defendant was ever arrested. It is equally apparent

^{13.} Morgan would not contend that the prosecutor is not free in closing argument to argue to the jury that the evidence has established defendant's guilt beyond a reasonable doubt. That is quite a different proposition from asking a jury to assume during the course of the introduction of evidence that the defendant is guilty.

^{14.} Wigmore on Evidence, 4th Ed. §988 at 912.

that the question as to whether Morgan knew about the receivership could not be decided until it had been submitted to and decided by the jury. The prosecutor certainly could not establish as a fact that Morgan had known about the receivership at the time he asked the questions of the character witnesses.

The courts' concern with the factual basis for questions concerning the defendant's misconduct is set forth in U. S. v. Bermudez, 526 F.2d 89 (2nd Cir. 1975), which is a case in which the prosecutor supplied documentary proof in the trial court of the arrest in question. In U. S. v. Silverman, 430 F.2d 106 (10th Cir. 1970), apparently no proof of the prior arrest was supplied, but defense counsel made no argument that the prior arrests had never occurred and merely argued that the evidence should not be admitted because none of the arrests had culminated in convictions. U. S. v. Silverman, supra, at 125. In the present case, Morgan consistently denied that he had known of the receivership at the time the Display securities had been sold. Incredibly, the prosecutor was allowed to ask a question concerning a purported "fact" which it was absolutely impossible for the prosecutor to prove unless the government established

that Morgan was guilty! Morgan submits that no authority exists which would support such a ridiculous and paradoxical procedure.

The decision in Michelson v. U. S., supra, is considered by the court in Roberson v. United States, 237 F.2d 536 (5th Cir. 1956). The Roberson court points out that in Michelson, "the Supreme Court itself implied essential safeguards which have not been observed in the present case. For example, the Court made repeated note of the fact that the trial court had ascertained out of the presence of the jury that the arrest or conviction had actually occurred." [Emphasis in original.] Morgan does not contend that such an evidentiary hearing is always necessary whether or not it is requested by the defendant. He would merely point out that in the present case an evidentiary hearing concerning the hypothetical question would have been a complete nullity. The trial court should have concluded, without any evidentiary hearing what soever, that it would have been absolutely impossible for the prosecutor to establish that Morgan had known of the receivership of Display at the time he sold the securities. The essential point is that courts are universally concerned with the truth of the "misconduct" asked

about on cross-examination. When the "misconduct" cannot be established, the question should not be asked.

Finally, even if the Court should find that the questions asked by the prosecutor were proper and that the answers of the defense character witnesses were admissible as evidence, Morgan submits that any probative value of the questions and answers of the character witnesses was far outweighed by the prejudicial impact upon the jury. In Awkard v. U. S., 352 F.2d 641 (D.C. Cir. 1965), another instance of cross-examination of defense character witnesses by the prosecutor was considered. The Circuit Court of Appe 1s for the District of Columbia stated:

"[T]he use of such evidence must be closely supervised by the trial judge, not only to assay the prosecuting attorney's good faith but to consider whether the probative value of the information which might be elicited outweighs the prejudice to the defendant." Awkard v. U. S., supra, at 643.

The rule is well established in the Second Circuit that the trial court must make a determination as to whether evidence is too prejudicial to be admitted if its probative impact is slight. See <u>U. S. v. Bermudez</u>, supra, and <u>U. S. v. Papadakis</u>, 510 F.2d 287 (2nd Cir. 1975), cert. den.,

421 U.S. 950 (1975). It is a natural human tendency to think less of a person who is known to have committed a crime. If the questions had concerned prior relevant arrests of the defendant or prior relevant acts of misconduct of the defendant not pertaining to the charge with which he had been tried, it is easy to see that the answers might have had probative value. However, evidence of the witnesses' knowledge or lack of knowledge of prior unrelated misconduct is certainly a different matter from the technique considered in the present case of using the indictment itself as a bootstrap to attempt to challenge the witnesses' opinion and presume the defendant's guilt.

For the reasons set forth above, Morgan submits that he was denied his right to a fair trial and to due process of law and therefore prays that the case be reversed and remanded for a new trial.

PROPOSITION III

THE TRIAL COURT ERRED IN REFUSING TO
PERMIT TESTIMONY IN SUPPORT OF THE "GOOD FAITH"
DEFENSE RAISED BY MORGAN WHICH DENIED MORGAN'S
RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW.

Morgan's defense to the allegations in the indictment was that he had no intent to deceive

purchasers of stock of Display and that any information that he forwarded them or any alleged material omissions, were made based upon information he received from Display. His reliance upon this information constituted his "good faith" defense.

One of the representatives of Display was Henry McCarthy. As McCarthy was not a defendant in the case, each time counsel for Morgan sought to cross-examine witnesses as to whether McCarthy had told that witness what Morgan claimed was told him, the prosecutor objected and the trial court sustained each objection. (31A-32A-33A-34A-39A-43A-44A-17A-48A) Apparently the trial court confused the co-conspirator exception to the hearsay rule with the exception to the hearsay rule that statements upon which a party relied are admissible to show the good faith of the party although not admissible to prove the truth of the statements. U. S. v. Nixon, 418 U.S. 683 (1974); Ohio Associated Tel. Co. v. National Labor Relations Board, 192 F.2d 664 (6th Cir. 1951).

In the present case, Morgan sought to elicit testimony of other witnesses that representatives of Display had made statements to the witness which were identical to the statements made to

Morgan and upon which Morgan relied for his "good faith" defense. The statements were obviously relevant as, if the statements had been made to other persons, this was probative of the fact that they were also made to and relied upon by Morgan. By denying Morgan the opportunity to elicit this testimony, the trial court denied him a fair opportunity to present competent proof of his defense. This constituted a denial of due process under the Fifth Amendment to the United States Constitution. U. S. v. Nixon, 418 U.S. 683 (1974); Clark v. Reid, 441 F.2d 801 (5th Cir. 1971).

Labor Board, supra, an employer relied upon certain statements in taking a particular course of action and his reliance upon the statements was his basic defense to the cause of action. The statements were omitted from evidence even though the good faith of the employer in relying upon the statements was the primary issue. The court held that it was error to exclude these statements and stated:

"[T]hese reports are not merely admissible but coming from numerous sources they became highly persuasive." Ohio Associated Tel. Co. v. National Labor Relations Board, supra, at 667. The court further relied upon language of Professor Wigmore:

"Where the question is whether the party has acted prudently, wisely or in good faith, the information on which he acted, whether true or false, is original and material evidence and not hearsay." Ohio Associated Tel. Co. v. National Labor Relations Board, supra, at 667.

The above proposition asserted by Professor Wigmore appears to have been universally accepted.

Emich Motors Corp. v. General Motors Corp., 181

F.2d 70 (7th Cir. 1950), rev., 340 U.S. 558 (1951),

reh. den., 341 U.S. 906, (1951); Cyr v. American

Guaranty and Liability Insurance Co., 242 F.2d 8

(2nd Cir. 1957); Schwarzenbach-Huber Company v.

National Labor Relations Board, 408 F.2d 236 (2nd Cir. 1969), cert. den., 396 U.S. 960 (1969).

The failure of the trial court to allow admission of the above testimony directly impaired the ability of Morgan to present his defense. It did not involve collateral matters; it involved the heart of the defense. As Morgan was not allowed to present his basic defense, he was denied fundamental fairness and due process under the Fifth Amendment to the Consitution of the United States. Morgan therefore prays that this case be reversed and remanded to the trial court.

CONCLUSION

Based upon the unfair association with the "Mafia," the improper cross-examination of Morgan's

character witnesses by questions that presumed Morgan's guilt, and the failure of the trial court to allow Morgan to present his defense, Morgan prays that this case be reversed and remanded to the trial court for a new trial.

Respectfully submitted,

TROTTER & ADAMS LANG

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411 Thurston National Building
Tulsa, Oklahoma 74103
(918) 583-3145

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-19-76 -23-76 -24-76	Trial cont'd. Trial cont'd. Trial cont'd. Trial cont'd. Govt. Rests. Dfts. motion to dismiss et. 20					
-25-76 -26-76	Trial Cont'd. Trial Cont'd. Both sides rest. Gots, motion to dismiss ct. 70					
-27-76	Granted. Summations. Trial Cont'd. Charge. Jury finds the dft. Dudley Morgan Guilty on each of counts 6,7,8,9,10,11,15,16,17,18,19,21,33,34. Sentence Oct. 8,1976. Pre Sentence Investigation ordered. Bail Cont'dWyatt J.					
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UNITED STATES OF AMERICA

-v-

VICTOR DANENZA,
FRANK DELL'AGLIO,
K. CYRUS MELIKIAN,
MICHAEL BRODSKY,
DUDLEY MORGAN and
TRIPLE MANAGEMENT, INC.

1141 1141

Defendants.

COUNT ONE

The Grand Jury charges:

- l. At relevant times, defendant FRANK DELL'AGLIO was president and a director of Display Sciences, Inc. (hereinafter "Display"), a New York corporation engaged in the business of assembling and selling widescreen projectors. At relevant times Display had its principal offices in New Jersey or Pennsylvania.
- 2. During the period beginning on or about April 12, 1971, continuing to on or about August 15, 1972, defendant K. CYRUS MELIKIAN was Chairman of the Board of Directors of Display and defendant MICHAEL BRODSKY was a Director of Display.
- 3. At all relevant times, "International Television Productions, Inc." (hereinafter ITP) was an entity represented to be a corporation incorporated in Pennsylvania, but which in truth and in fact was never incorporated in Pennsylvania or elsewhere and was merely an entity created and utilized by defendants MELIKIAN and BRODSKY to hold an option to purchase 400,000 shares of Display common stork at 25 cents a share, said option

having been issued to ITP on April 12, 1971, the date on or about which defendant MELIKIAN became Chairman of the Board of Directors of Display and defendant BRODSKY became a Director of Display.

- 4. At all relevant times, defendant MELIKIAN represented himself to be the President and a Director of ITP and defendant BRODSKY represented himself to be the Secretary and a Director of ITP. At all relevant times, defendants MELIKIAN and BRODSKY were the persons controlling ITP.
- 5. At all relevant times, defendant VICTOR DANENZA employed and utilized defendant TRIPLE MANAGEMENT, INC. (hereinafter "TRIPLE"), a corporation he caused to be incorporated in New York in December, 1971, for the primary purpose of secretly trading in securities for his personal benefit. By disguising his control of defendant TRIPLE, defendant DANENZA, was able, among other things, to evade his obligation and duty to file income tax returns for TRIPLE.
- 6. Rule 133, promulgated under the Securities Act of 1933, and which was in effect at the time of the fraudulent transactions hereinafter described in Counts One, Two and Three, provided that, under certain circumstances, a merger between two corporations need not be the subject of certain registration and disclosure requirements of said Securities Act of 1933. However, such registration and disclosure requirements had to be complied with if the entity to be acquired was not a corporation. Furthermore even if the entity to be acquired was a corporation where the persons causing the merger had sufficient control of the voting stock of the corporation to be acquired to cause the vote of the stockholders on the merger to be a mere formality, the examption from the registration and disclosure requirements provided by Rule 133 would not be

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available. Moreover, Rule 133 further provided that persons who were in control of the acquired corporation and who received securities of the acquiring corporation in a Rule 133 transaction with a view to the distribution thereof, could not sell in excess of one per cent of the outstanding shares of the acquiring corporation in a six-month period without first registering any such excess under the Securities Act of 1933.

- 7. At all relevant times, defendant DUDLEY MORGAN served as the manager of the Tulsa, Oklahoma office of the brokerage firm of Van Alstyne Associates, Inc.
- 8. From on or about March 1, 1972 up to and including August 15, 1972, in the Southern District of New York and elsewhere, VICTOR DANENZA, FRANK DELL'AGLIO, K. CYRUS MELIKIAN, MICHAEL BRODSKY and TRIPLE, defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with other persons to the Grand Jury known and unknown, to commit offenses against the United States, to wit, securities fraud in violation of Title 15, United States Code, Sections 77e, 77q(a), 77x, 78j(b) (including Rule 10b-5 promulgated thereunder) and 78ff.

OBJECT OF THE CONSPIRACY

9. The principal objects of the conspiracy included:

- (a) the fraudulent transfer of control of Display from defendants MELIKIAN and BRODSKY to defendants DANENZA, TRIPLE and DELL'AGLIO without disclosing said transfer to the outstanding public stockholders of Display;
- (b) to avoid compliance with the registration . and disclosure requirements of the Securities Act of 1933 in order to fraudulently make available to defendants DANENZA and TRIPLE 100,000 shares of Display's common stock for resale to the investing public;
- (c) the use of a portion of the monies derived from said fraudulent transfer of control of Display to pay off a loan which defendants MELIKIAN and BRODSKY had fraudulently obtained in the name of Display, the elimination of the personal liability of defendants MELIKIAN and BRODSKY for the re-payment of the said loan and the release of the collateral which had been pledged by defendants MELIKIAN and BRODSKY as collateral for the said loan;
- (d) the use of the balance of the monies derived from said fraudulent transfer of control of Display for the further personal financial benefit of defendant BRODSKY;
- (e) the fraudulent acquisition by defendant DELL'AGLIO of an option to purchase 250,000 shares of Display common stock at twenty-five cents per share, a price per share which was substantially below the then current market price.

MEANS BY WHICH THE CONSPIRACY WAS CARRIED OUT

10. Among the means by which the defendants would and did carry out the conspiracy were the following:

BEST GOPY AVAILABLE

(a) On or about March 1, 1972, defendants DANENZA and DELL'AGLIO agreed to a plan whereby they would cause Display to acquire ITP by causing Display to issue to ITP 100,000 shares of its common stock in a fraudulent merger transaction which would appear to comply with Rule 133 of the Securities Act of 1933; .furthermore, defendants DANENZA, DELL'AGLIO, MELIKIAN and BRODSKY subsequently agreed that the 100,000 shares of Display common stock issued to ITP would be resold to defendant TRIPLE at a price to be determined by the defendants.

(b) On or about March 20, 1972, defendant MELITTAN coused the signatures of six persons to be forged to certain documents and stock powers, which signatures fraudulently represented said persons to be ITP stockholders and the recipients of Display common stock pursuant to the terms of the fraudulent Rule 133 merger transaction, when in fact defendant MELIKIAN well knew that these six persons were not truly stockholders of ITP or Display.

(c) On or about March 20, 1972, defendants

DELL'AGLIO and MELIKIAN obtained the signatures of four persons to certain legal documents and stock powers by means of false representations and deceptive and misleading statements, and defendant MELIKIAN caused the signatures of at least three of said persons to be forged to certain other documents and stock powers.

(d) Defendants DANENZA, DELL'AGLIO, MELIKIAN and BRODSKY fraudulently withheld from three attorneys they employed to prepare and revise the documents utilized for the fraudulent Rule 133 merger transaction the following material facts:

that certain of the signatures on the stock powers and legal documents were forged and that others were obtained by means of false representations;

- (2) that ITP was not a corporation;
- (3) that defendants MELIKIAN and BRODSKY intended to immediately resell to defendant TRIPLE, in violation of Rule 133, the 100,000 shares of Display common stock issued to ITP but which defendants MELIKIAN and BRODSKY in fact controlled and beneficially owned;
- (4) that defendants MELIKIAN, BRODSKY, DANENZA, TRIPLE and DELL'AGLIO intended to make available for resale 160,00° shares of unregistered and unlegended Display common stock in a distribution to the investing public in violation of the registration and disclosure provisions of the federal securities laws; and
- (5) that the Rule 133 merger transaction was a sham and was being utilized to unlawfully circumvent the registration requirements of the federal securities laws.
- (e) Pursuant to the terms of the sham Rule 133 merger transaction, defendants DANENZA, DELL'AGLIO, MELIKIAN and BRODSKY arranged for the fraudulent transfer from defendants MELIKIAN and BRODSKY to defendant TRIPLE at a price substantially below the then current market price for Display common stock the 100,000 shares of unregistered and unlegended Display common stock fraudulently issued in the name of ITP's twelve alleged stockholders.
- Pennsylvania office of the brokerage firm of Fahnestock and Co. certain documents which caused said brokerage firm to transfer the 100,000 shares of unregistered and unlegended Display common stock to defendant TRIPLE; these documents consisted of (1) a May 1, 1972 agreement setting forth the terms of the transfer from defendant MELIKIAN and BRODSKY to defendant TRIPLE of the 100,000 shares of Display common stock falsely represented to be owned by the twelve alleged ITP stockholders; (2) from the stockholders;

stock powers for shares of Display common stock to be sold; and (3) a May 2, 1972 opinion letter from an attorney authorizing Display's transfer agent to issue in specified amounts 100,000 shares of unlegended Display common stock in the names of the twelve alleged ITP stockholders.

- (g) On or about May 9, 1972, defendants MELIKIAN and BRODSKY sold through Fahnestock and Co. 60,000 shares of Display common stock for \$40,000 to Andras Hatch & Heatherington, Ltd., a Toronto, Canada brokerage firm for the account of defendant TRIFLE.
- (h) Or or about August 2, 1972, defendants
 MELIKIAN and BRODSKY sold through Fahnestock and Co. 30,000
 shares of Display common stock for \$7,000 to Andras Hatch & Heatherington Ltd., for the account of defendant TRIPLE.
- (i) Defendants MELIKIAN and BRODSKY caused Fahnestock and Co. to issue two checks in the amounts of \$39,400 and \$6,616, comprising the net proceeds derived from the sales described in the previous two paragraphs, to the Central Penn National Bank, to be credited as follows: \$40,997.63 against an outstanding loan which defendants MELIKIAN and BRODSKY had personally guaranteed and pledged their own securities as collateral for and \$5,018.37 against a personal note of defendant BRODSKY.

OVERT ACIES

the objects thereof, defendants DANENZA, DELL'AGLIO, MELIKIAN, BRODSKY and TRIPLE did commit the following overt acts, among others, in the Southern District of New York:

- (a) Between on or about February 15, 1972 and March 16, 1972, defendants DANENZA and DELL'AGLIO met at defendant DANENZA'S apartment, Penthouse C, 155 East 55th Street, New York, New York and formulated the plan for the sham Rule 133 merger transaction between Display and ITP so that the registration requirements of the Securities Act of 1933 could be unlawfully circumvented.
- (b) Between on or about February 15, 1972 and March 16, 1972 defendant DELL'AGLIO met Leo Levy, an attorney, at 51 East 42nd Street, New York, New York and requested attorney Levy to prepare and revise certain documents for use in the sham Rule 133 merger transaction without disclosing to attorney Levy the sham nature of the transaction.
- (c) Between on or about February 15, 1972 and March 16, 1972 defendants DELL'AGLIO, MELIKIAN and BRODSKY met with attorney Levy at 51 East 42nd Street, New York, New York and presented for his review certain legal documents which the defendants knew contained forged signatures and signatures obtained by means of false representations but which information said defendants failed to disclose to attorney Levy.
- (d) Between on or about March 16, 1972 and May 1, 1972 at defendant DANENZA's apartment, defendant DANENZA requested Melvin Katz, an attorney, (1) to draft an agreement documenting the transfer to defendant TRIPLE of the 100,000 shares of unregistered and unlegended Display common stock falsely represented to be owned by the twelve alleged ITP shareholders, and (2) to serve as escrow agent for said shares.

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- (e) On or about May 1, 1972, defendant DANENZA caused a letter to be delivered from his apartment to attorney Katz's office at 150 East 50th Street, New York, New York.
- (f) On or about May 3, 1972, defendant DELL'AGLIO caused certificates representing 100,000 shares of Display common stock issued in the names of ITP's twelve alleged stock-holders to be delivered to attorney Katz.
- (g) On or about May 4, 1972, defendant MELIKIAN caused a letter to be delivered to attorney Katz's office instructing Katz to send 60,000 of the 100,000 shares of Display common stock in his possession to Fahnestock and Co.
- (h) On or about July 27, 1972, defendants
 MELIKIAN and BRODSKY caused a letter to be delivered to attorney
 Katz's office, which letter falsely stated that pursuant to an
 attached agency agreement (which contained forged signatures
 and signatures obtained by false representations) the twelve
 alleged ITP shareholders had appointed defendants MELIKIAN and
 BRODSKY as their agents and that, as such, defendants MELIKIAN
 and BRODSKY consented to an agreement dated July 15, 1972,
 amending the terms for the transfer to defendant TRIPLE of the
 remaining 40,000 shares of Display common stock held in escrow
 by attorney Katz.

STATUTORY ALLEGATIONS

- 12. It was part of the conspiracy that defendants
 DANENZA, DELL'AGLIO, MELIKIAN, BRODSKY and TRIPLE would and did
 unlawfully, wilfully and knowingly:
- (a) make use of means and instruments of transportation and communication in interstate commerce and the
 mails, directly and indirectly, to offer to sell and sell,
 cause to be offered for sale and to be sold, and aided and abetted

the offer and sale of securities, to wit, shares of Display common stock, without a prospectus at a time when no registration statement as to said securities was in effect with the Securities and Exchange Commission in violation of Title 15, United States Code, Section 77(e) and Title 18, United States Code, Section 2;

- securities, to wit, shares of Display common stock, by use of means and instruments of transportation and communications in interstate commerce and by use of the mails, directly and indirectly (i) employ devices, schemes and artifices to defraud; (ii) obtain money and property by means of untrue statements of material facts and by means of omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading and (iii) engage in transactions, practices and courses of business which would and did operate as a fraud and deceit upon the purchasers and prospective purchasers of the aforementioned securities in violation of Title 15, United States Code, Section 77q(a); and
- (c) in connection with the purchase and sale of securities, to wit, the shares of Display common stock, directly and indirectly, by use of the means and instrumentalities of interstate commerce and the mails, use and employ manipulative and deceptive devices and contrivances in violation of Rule 10b-5 (17 Code of Federal Regulations 240.10b-5) of the rules and regulations of the Securities and Exchange Commission.

(Title 18, United States Code, Sections 371 and 2)

COUNT TWO

The Grand Jury further charges:

1. From on or about March 1, 1972 up to and including August 15, 1972, in the Southern District of New York and elsewhere, VICTOR DAMENZA, FRANK DELL'AGLIO, K. CYRUS MELIKIAN,

MICHAEL BRODSKY and TRIPLE MANAGEMENT, INC., the defendants, and others, unlawfully, wilfully and knowingly in the offer and sale of securities, to wit, shares of Display common stock, by use of the instruments of transportation and communication in interstate commerce and by use of the mails, directly and indirectly did (a) employ devices, schemes and artifices to defraud, (b) obtain money and property by means of untrue statements of material facts and by means of omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, and (c) engage in transactions, practices and courses of business which would and did operate as a fraud and deceit upon Display's outstanding public stockholders and upon purchasers and would-be purchasers of Display common stock.

- 2. The allegations contained in Paragraphs 1 through 6 of Count One of this indictment are hereby repeated and incorporated as if fully set forth herein. The allegations contained in Paragraph 10 of Count One of this indictment are hereby repeated and incorporated as if fully set forth herein as constituting and describing some of the means by which the defendants committed the offense charged in this Count.
- 3. On or about April 1, 1972, in the Southern District of New York, the defendants referred to in Paragraph 1 of this Count, unlawfully, wilfully and knowingly did use and cause to be used means and instruments of transportation and communication in interstate commerce pursuant to and in furtherance of the scheme and unlawful activity alleged in Paragraph 1 of this Count in that defendants MELIKIAN and BRODSKY, while carrying fraudulent documents to be used in furtherance of said scheme, did travel from Philadelphia, Pennsylvania to New York, New York in order to participate in a meeting with attorney Levy and defendant Dell'Aglio.

(Title 15, United States Code, Section 77q(a) and

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COUNT THREE

The Grand Jury further charges:

- 1. From on or about March 1, 1972 up to and including August 15, 1972, in the Southern District of New York and elsewhere, VICTOR DANENZA, FRANK DELL'AGLIO, K. CYRUS MELIKIAN, MICHAEL BRODSKY and TRIPLE MANAGEMENT, INC., the defendants, and others, unlawfully, wilfully and knowingly did, directly and indirectly, by use of means and instrumentalities of interstate commerce and the mails, use and employ in connection with the purchase and sale of securities, to wit, shares of Display common stock manipulative and deceptive devices and contrivances in contravention of Rule 10b-5 (17 Code of Federal Regulations 240.10b-5) of the rules and regulations of the Securities and Exchange Commission.
- 2. The allegations contained in Paragraphs 1 through 6 of Count One of this indictment are hereby repeated and incorporated as if fully set forth herein. The allegations contained in Paragraph 10 of Count One of this indictment are hereby repeated and incorporated as if fully set forth herein as constituting and describing some of the means by which the defendants committed the offense charged in this Count.
- District of New 1073, said defendants, unlawfully, wilfully and knowingly did u e and cause to be used means and instrumentalities of transportation and communication in interstate commerce and the mails pursuant to and in furtherance of the schemes and unlawful activities alleged in Paragraph 1 of this Count in that defendants MELIKIAN and BRODSKY sent or caused to be sent from Philadelphia, Pennsylvania to attorney Katz in New York, New York, a letter and an agency agreement dated April 15, 1972 and containing forged signatures, designating defendants MELIKIAN and BRODSKY as agents for the twelve alleged archolders of ITP

who purportedly received Display common stock pursuant to the
fraudulent merger transaction.

(Title 15, United States Code, Sections 78j(b)
and 78ff and 17 CFR Section 240.10b-5
Title 18, United States Code, Section 2).

COUNTS FOUR THROUGH TWENTY-ONE

The Grand Jury further charges:

1. From on or about March 20, 1972 up to and
including October 25, 1972, in the Southern District of New
York and elsewhere, VICTOR DANENZA, FRANK DELL'AGLIO, DUDLEY

York and elsewhere, VICTOR DANENZA, FRANK DELL'AGLIO, DUDLEY MORGAN and TRIPLE, the defendants, unlawfully, wilfully and knowingly did de se and intend to devise a scheme and artifice to defraud the purchasers and would be purchasers of Display common stock and to obtain money and property from said persons by means of false and fraudulent pretenses, representations and promises.

2. It was a part of said scheme and artifice to

- 2. It was a part of said scheme and artifice to defraud that unregistered shares of Display common stock would fraudulently be offered for sale and would be sold to the investing public without a registration statement being in effect with the Securities and Exchange Commission with respect to such shares.
- 3. The allegations contained in Paragraphs 1, 5, 6 and 7 of Count One of this indictment are hereby repeated and incorporated in Counts Four through Twenty-One as if fully set forth herein.
- 4. Among the means by which the defendants would and did carry out said scheme and artifice to defraud were the following:
- (a) On or about March 20, 1972 defendants

 DANENZA and DELL'AGLIO informed defendant MORGAN of the means
 by which defendant TRIPLE acquired 90,000 shares of Display

 common stock and defendants MORGAN, DELL'AGLIO and DANENZA then

discussed the need for defendant MORGAN to sell enough shares of Display common stock to raise the funds necessary to enter into a settlement agreement with Display's creditors so that Display would no longer be in receivership in New Jersey.

- (b) From on or about April 21, 1972 up to and including October 25, 1972, defendants DANENZA, DELL'AGLIO, MORGAN and TRIPLE directly and indirectly, prepared and caused to be prepared, distributed and caused to be distributed to purchasers and prospective purchasers of Display common stock, information and sales literature containing the following false, fraudulent and misleading statements and representations:
 - On April 21, 1972, it was stated the final contract with Connecticut would be forthcoming and should be approved within the next two weeks.
 - 2. On June 5, 1972 it was stated a publicity release should be received this month with the simultaneous signing of the off-track betting contract with the State of Connecticut.
 - 3. Display had only 325,000 shares of common stock outstanding on May 15, 1972.
- (c) During the course of the said scheme and artifice to defraud defendants DANENZA, DELL'AGLIO, MORGAN and TRIPLE concealed and caused to be concealed and omitted and caused to be omitted from disclosure to purchasers and prospective purchasers of Display common stock the following material information:

- 1. That Display had been ordered into involuntary receivership on November 10, 1971 by a New Jersey state court upon the ground that Display had become unable to pay its debts.
- 2. That Display continued in receivership for a portion of the period during which the defendants offered and caused to be offered and sold and caused to be sold Display common stock to purchasers and prospective purchasers.
- 3. That a substantial portion of the monies received or to be received by the defendants from the sale of Display common stock pursuant to the scheme and artifice to defraud was being used and was to be used to finance a settlement agreement with Display's creditors.
- 4. That defendant Morgan had offered and promised to give to his salesmen without charge Display common stock as an incentive to their selling said stock to their customers.
- 5. For the purpose of executing said scheme and artifice to defraud and attempting to do so, the defendants DANENZA, DELL'AGLIO, MORGAN and TRIPLE, did place and cause to be placed in pot offices and authorized depositories for mail matter and did cause to be delivered by mail according to the directions thereon certain matter to be sent and delivered by the United States Postal Serice.
- 6. On or about the dates hereinafter set forth, in the Southern District of New York, said defendants, unlawfully, wilfully and knowingly, in furtherance of the aforesaid scheme to defraud, did cause to be delivered by mail by the Postal Service according to the direction thereon, from the offices of Van Alstyne Associates, Inc., 4 Albany Street, New York, New York, to the persons hereinafter set forth, the matter hereinafter set forth:

			MA PARTET
COUNT	DATE	ADDRESSEE	MATTER
4	5/5/72	Sam Aubrey P.O. Box 45370 Tulsa, Oklahoma	Confirmation of Purchase of 400 shares of Display stock
5 .	5/5/72	Sam Aubrey P.O. Box 45370 Tulsa, Oklahoma	Confirmation of Purchase of 200 shares of Display stock
6	5/17/72	Paul Baker 4815 South Harvard Tulsa, Oklahoma	Confirmation of Purchase of 3,000 shares of Display stock
7	5/17/72	Robert Baker and Nancy Baker 1329 E. 26th Place Tulsa, Oklahoma	Confirmation of Purchase of 200 shares of Display stock
. 8	5/17/72	Bakers Group c/o Robert Baker Box 45183 Tulsa, Oklahoma	Confirmation of Purchase of 200 shares of Display stock
9	5/18/72	Charles R. BEnjamin c/o International P.O. Box 1070 Sapulpa, Oklahoma	Confirmation of Purchase of 1,000 shares of Display stock
10	5/18/72	Paul H. Brinkley & Grace W. Brinkley 3747 S. Delaware Pl. Tulsa, Oklahoma	Confirmation of Purchase of 1,100 shares of Pisplay stock
11	5/19/72	David Burton c/o International Metal Co. P.O. Box 1070 Sapulpa, Oklahoma	Confirmation of Purchase of 1,000 shares of Display stock
12	7/20/72	David Burton c/o International Metal Co. Sapulpa, Oklahoma	Confirmation of Purchase of 200 shares of Display stock
13	7/24/72	Pavid Burton c/o International Hetal Co. P.O. Box 1070 Sapulpa, Oklahoma	Confirmation of Purchase of 500 shares of Display stock
14	9/28/77		Confirmation of Purchase of 200 shares of Display stock
15	5/19/7	2 H. David Collins 304 Philtower Bldg. Tulsa, Oklahoma	Confirmation of purchase of 1,000 shares of Display stock.
16	5/18/7	2 Jerry Clark and Hazel Clark 3703 South 80 West Ave Tulsa, Oklahoma	Confirmation of Purchase of 100 shares of Display Stock

COUNT	DATE	ADDRESSEE	MATTER	
17	5/17/72	R. Paul Heap 4111 South Darlington Tulsa, Oklahoma	Confirmation of Purchase of 300 shares of Display stock	
18 .	7/12/72	Edith Kovats 10926 E. 27th St. Tulsa, Oklahoma	Confirmation of Purchase of 200 shares of Display stock	
19	5/17/72	David Prater 4965 E. 26th Pl. Tulsa, Oklahoma	Confirmation of Purchase of 500 shares of Display stock	
20	5/17/72	Professional Investors Life Insurance Co. 1560 E. 21st St. Tulsa, Oklahoma	Confirmation of Purchase of 1,000 shares of Display stock	
21	5/17/72	Hugh E. Smith and Cleo G. Smith 6013 North Lewis Tulsa, Oklahoma	Confirmation of Purchase of 200 shares of Display stock	

(Title 18, United States Code, Sections 1341 and 2)

COUNTS TWENTY-TWO THROUGH THIRTY-TWO

The Grand Jury further charges:

- 1. From on or about March 20, 1972 up to and including October 25, 1972, in the Southern District of New York and elsewhere, VICTOR DANENZA, FRANK DELL'AGLIO, DUDLEY MORGAN and TRIPLE, the defendants, unlawfully, wilfully and knowingly, directly and indirectly, made use of means and instruments of interstate commerce and of the mails to sell securities, to wit, shares of Display common stock to the hereinafter listed addressees, on or about the dates and in the amounts listed in Counts Twenty-Tro through Thirty-Two below, without a prospectus, at a time when no registration statement as to said securities was in effect with the Securities and Exchange Commission.
- 2. The allegations contained in Paragraphs 1, 5, 6 and 7 of Count One of this indictment are hereby repeated and incorporated in Counts Twenty-Two thro h Thirty-Two as if fully set forth herein. The allegations contained in Paragraph 4 of

Counts Four through Twenty-One of this indictment are hereby repeated and incorporated as if fully set forth herein as constituting and describing some of the means by which the said defendants committed the offenses charged in Counts Twenty-Two through Thirty-Two.

COUNT	DATE	ADDRESSEE	MATTER
22	5/17/72	Paul Baker 4815 South Harvard Tulsa, Oklahoma	Confirmation of Purchase of 3,000 shares of Display stock
23	5/17/72	Robert er 1329 E. Joth Place Tulsa, Oklahoma	Confirmation of Purchase of 200 shares of Display stock
24	5/18/72	Charles R. Benjamin c/o International Metal Co. P.C. Box 1070 Sapulpa, Oklahoma	Confirmation of Purchase of 1,100 shares of Display stock
25	5/18/72	Paul H. Brinkley 3747 S. Delaware Pl. Tulsa, Oklahoma	Confirmation of Purchase of 1,000 shares of Display stock
26	5/19/72	Pavid Burton c/o International Metal Co. P.U. BOX 1070 Sapulpa, Oklahoma	Confirmation of Purchase of 1,000 shares of Display stock
27	5/18/72.	Jerry Clark 3708 S. 80 West Ave. Tulsa, Oklahoma	Confirmation of Purchase of 100 shares of Display stock
23	5/19/'2	H. David Collins 304 Philtower Bldg. Tulsa, Oklahoma	Confirmation of Purchase of 1,000 shares of Display stock
29	5/17/72	R. Paul Heap 4111 South Darlington Tulsa, Oklahoma	Confirmation of Purchase of 300 shares of Display stock
30	7/12/*2	Lesley Kovats 10926 E. 27th Street Tulsa, Oklahoma	Confirmation of Purchase of 200 shares of Display stock
31	5/17/*2	David E. Prater 4965 East 26th Place Tulsa, Oklahoma	Confirmation of Purchase of 500 shares of Display stock
32	5/17/*2	Professional Investors Life Insurance Co. 1560 E. 21st Street Tulsa, Oklahoma	Confirmation of Purchase of 1,000 shares of Display stock

(Tible 15, United States Code, Section 77e and 77x Tible 18, United States Code, Section 2)

19.

COUNT THIRTY-THREE

The Grand Jury further charges:

- 1. From March 20, 1972 up to and including October 25, 1972, in the Southern District of New York and elsewhere, VICTOR DANENZA, FRANK DELL'AGLIO, DUDLEY MORGAN and TRIPLE, the defendants, unlawfully, wilfully and knowingly, in the offer and sale of securities, to wit, shares of Display common stock by use of the means and instruments of transportation and communication in interstate commerce and by use of the mails, directly and indirectly did (a) employ devices, schemes and artifices to defraud; (b) obtain money and property by means of untrue statements of material facts and by means of omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (c) engage in transactions, practices and courses of business which would and did operate as a fraud and deceit upon the purchasers and would-be purchasers of said securities.
 - 2. The allegations contained in Paragraphs 1, 5, 6 and 7 of Count One of this indictment are hereby repeated and incorporated as if fully set forth herein. The allegations contained in Paragraph 4 of Counts Four through Twenty-One of this indictment are hereby repeated and incorporated as if fully set forth herein, as constituting and describing some of the means by which the defendants committed the offense charged in this Count.
 - 3. On or about the dates hereinafter set forth in this Count, in the Southern District of New York, said defendants, unlawfully, wilfully and knowingly, directly and indirectly did use and cause to be used the means and instruments of transportation and communication in interstate commerce and the mails pursuant to and in furtherance of the scheme alleged in Paragraph 1 of this Count by causing confirmations of purchase of Display common stock to be mailed from the offices

of Van Alstyne Associates, Inc. 4 Albany Street, New York, New York, to the persons hereinafter set forth:

	DATES	ADDRESSEE	MATTER
a	5/5/72	Sam Aubrey P.O. Box 45370 Tulsa, Oklahoma	Confirmation of Purchase of 400 shares of Display stock
Þ	5/18/72	Charles Benjamin c/o International Metal Co. P.O. Box 1070 Sapulpa, Oklahoma	Confirmation of Purchase of 1,000 shares of Display stock
c	5/17/72	Paul Baker 4815 South Harvard Tulsa, Oklahoma	Confirmation of Purchase of 3,000 shares of Display stock
ä	5/18/72	Paul Brinkley and Grace Brinkley 3747 S. Delaware Place Tulsa, Oklah	Confirmation of Purchase of 1,000 shares of Display stock
•	5/19/72	David Burton c/o International Metal Co. P.O. Box 1070 Sapulpa, Oklahoma	Confirmation of Purchase of 1,000 shares of Display stock
f	5/19/72	Jerry Clark and Hazel Clark 3708 S. 80 West Ave. Tulsa, Oktanoma	Confirmation of Jurchase of low snares of Display stock
g	5/17/72	R. Paul Heap 4111 South Darlington Tulsa, Oklahoma	Confirmation of Purchase of 300 shares of Display stock
h	7/12/72	Edith Kovats 10926 East 27th Street Tulsa, Oklahoma	Confirmation of Purchase of 200 shares of Display stock
1	5/17/72	Professional Investors Life Insurance Co. 1560 East 21st Street Tulsa, Oklahoma	Confirmation of Purchase of 1,000 shares of Display stock
1	5/17/72	Hugh Smith and Cleo Smith 6013 North Lewis Tulsa, Oklahoma	Confirmation of Purchase of 200 shares of Display stock
			5 - He 770/4\ & 774

(Title 15, United States Code, Section 77q(a) & 77x Title 18, United States Code, Section 2)

COUNT THIRTY-FOUR

The Grand Jury further charges:

- 1. From March 20, 1972, up to and including October 25, 1972, in the Southern District of New York VICTOR DANENZA, FRANK DELL'AGLIO, DUDLEY MORGAN and TRIPLE, the defendants, unlawfully, wilfully and knowingly did, directly and indirectly, by use of means and instrumentalities of interstate commerce and the mails, use and employ in connection with the purchase and sale of securities, to wit, shares of Display common stock, manipulative and receptive devices and contrivances in contravention of Rule 10-5 (17 Code of Federal Regulations, Section 240.10b-5) of the rules and regulations of the Securities and Exchange Commission.
 - 2. The allegations contained in Paragraphs 1, 5, 6 and 7 of Count One of this indictment are hereby repeated and incorporated as if fully set forth herein. The allegations contained in Paragraph & of Counts Four through Twenty-One of this indictment are hereby repeated and incorporated as if fully set forth herein, as constituting and describing some of the means by which the defendants committed the offense charged in this Count.
 - 3. On or about the dates hereinafter set forth in this Count, in the Southern District of New York, said defendants, unlawfully, willfully and knowingly, directly and indirectly, did use and cause to be used the means and instrumentalities of interstate commerce and the mails pursuant to and in furtherance of the scheme and unlawful activity alleged in Paragraph 1 of this Count by causing confirmations of purchase of the common stock of Display to be mailed from the offices of Van Alstyne Associates, Inc., 4 Albany Street, New York, New York, to the persons hereinafter set forth as follows:

	DATES	ADDRESSEE	MATTER
•	5/5/72	Sam Aubrey P.O. Box 45370 Tulsa, Oklahoma	Confirmation of Purchase of 400 shares of Display stock
b ,	5/18/72	Charles Benjamin c/o International Metal Co. P.O. Box 1070 Sapulpa, Oklahoma	Confirmation of Purchase of 1,000 shares of Display stock
C	5/17/72	Paul Baker 4815 South Harvard Tulsa, Oklahoma	Confirmation of Purchase of 3,000 shares of Display stock
đ	5/18/72	Paul Brinkley and Grace Brinkley 3747 S. Delaware Place Tulsa, Oklahoma	Confirmation of Purchase of 1,000 shares of Display stock
4	5/19/72	David Burton c/o International Metal Co. P.O. Box 1070 Sapulpa, Oklahoma	Confirmation of Purchase of 1,000 shares of Display stock
f	5/19/72	Jerry Clark and Hazel Clark 3708 S. 80 West Ave. Tulsa, Oklahoma	Confirmation of Purchase of 100 shares of Display stock
Ř	5/17/72	R. Paul Hean 4111 South Darlington Tulsa, Oklahoma	Confirmation of Purchase of 300 shares of Display stock
h	7/12/72	Edith Kovats 10926 East 27th Street Tulsa, Oklahoma	Confirmation of Purchase of 200 shares of Display stock
1	5/17/72	Professional Investors Life Insurance Co. 1560 East 21st Street Tulsa, Oklahoma	Confirmation of Purchase of 1,000 shares of Display stock
j	5/17/72	Hugh Smith and Cleo Smith 6013 Forth Lewis Tulsa, Oklahoma	Confirmation of Purchase of 200 shares of Display stock

(Title 15 United States Code, Sections 78j(b) and 78ff and 17 CFR Section 240.10b-5; Title 18, United States Code, Section 2).

COUNT THIRTY-FIVE

The Grand Jury further charges:

1. From on or about January 1, 1972 up to and including March 15, 1973, in the Southern Dist 1ct of New York and elsewhere, defendant VICTOR DANENZA, would and did a use

defendant TRIPLE, a corporation not expressly exempt from tax, with its principal place of business at Penthouse C, 155 East 55th Street, New York, New York to be operated in such a manner so as to conceal his true interest in and association with said corporation; by so doing and by designating Neill Alenky and Catherine Ganet as officers of defendant TRIPLE when he then and there well knew they were unaware of the responsibilities of their positions and their duties to act in compliance with the Internal Revenue Laws, defendant VICTOR DANENZA unlawfully, wilfully and knowingly did cause defendant TRIPLE to attempt to evade and defeat a large part of the income tax due and owing by defendant TRIPLE to the United States of America for the calendar year 1972 by causing defendant TRIPLE to fail to file an income tax return for said calendar year and did conceal and attempt to conceal from all proper officers of the United States of America the true and correct taxable income of defendant TRIPLE, whereas he then and there well knew the taxable income of defendant TRIPLE was approximately the sum of \$181,303.68, upon which taxable income defendant TRIPLE owed to the United States of America income tax in the approximate amount of \$75,880.29.

2. Said unreported income in the approximate amount of \$181,3)3.68 represented money earned by defendant "RIPLE through the trading of securities at six brokerage houses known to the Grand Jury to have maintained accounts for defendant RIPLE.

Title 26, United States Code, Section 7201, Title 18, United States Code, Section 2).

COUNT THIRTY-SIX

The Grand Jury further charges:

1. Defendant VICTOR DANENZA was the person who, by reason of the manner in which he formed and operated defendant TRIPLE, had the duty to file the income tax return of defendant

TRIPLE, a corporation not expressly exemption tax and doing business during the calendar year 1972 in the Southern District of health and elsewhere, and which had and received during said calendar year gross income in the approximate amount of \$194.771.36, and he was by reason of his actual control of said corporation and his knowledge of such income, required by law, after the close of said calendar year and on or before March 15, 1972, for and on behalf of the said corporation to make an income tax return to the Internal Revenue Service stating specifically the items of the corporation's gross income and the deductions and credits allowed by law. Well knowing all of the foregoing facts, defendant VICTOR DANENZA did unlawfully, wilfully and knowingly fail to make said laturn to the Internal Revenue Service or to any proper officer of the United States of America within said proper time.

2. Said unreported income in the approximate amount of \$194,771.36 represented money earned by the defendant TRIPLE through the trading of securities at six brokerage houses known to the Grand Jury to have maintained accounts for defendant TRIPLE.

(Title 26, United States Code, Section 7203 and Litle 18, United States Code, Section 2).

FOREMAN

THOMAS J. CAHILL United States Attorney

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I am at a loss.

THE COURT: Have you seen it?

MR. ROSENTHAL: Yes, I have.

THE COURT: I may have seen it before, but let me take a look at it again.

(Handed to Court)

THE COURT: Mr. Dell'Aglio, is the plea about which you just testified a plea that was made before me?

THE WITNESS: Yes, your Honor.

THE COURT: I think it is admissible. It is relevant, Mr. Rosenthal. I am not passing on its weight and you are perfectly at liberty to argue to the jury that the statements here are self-serving. But it is obviously proper to show the jury the circumstance: under which Mr. Dell'Aglio's plea was entered.

MR. ROSENTHAL: It states more than that. are some self-serving declarations which I would rather not say in front of the jury.

> THE COURT: All right, come over to the side ba .. (At side bar)

MR. ROSENTHAL: I am most concerned with the portio that reads -- the second paragraph "Full and truthful disclosure of all information."

THE COURT: I am going to permit you to argue

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A The financial plight of Pisplay because we were in very difficult straits during the latter part of 1970. The company existed off its own assets until the moneys were going rather rapidly and I had gone out looking for new financing. I remember a specific call at my house where he had called rather irate one night and had--

THE COURT: About when?

THE WITNESS: Probably, your Honor, in about, I would say, the latter part of the summer.

THE COURT: Of 1970?

THE WITNESS: Yes, your Honor. The company was in very difficult straits financially and he had called very angry about the situation, where all the money had gone.

THE COURT: Just try to tell us as best you can what he said to you and what you said to him and don't summarize or give your opinions or conclusions.

THE WITNESS: He had indicated to me, he said,
"You know you have a Mafia up there, we have an Oklahoma
Mafia here."

MR. ROSENTHAL: I would move to have that stricken.

THE COURT: He says that is what they said. Motion denied.

Q Mr. Dell'Aglio, are you familiar with

AND THE PROPERTY OF THE PROPERTY OF

MR. SPEISER: Objection, your Honor.

THE COURT: Sustained.

THE WITNESS: Your Honor, may I have a drink of

24 water?

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THE COURT: Of course.

into Connecticut offtrack betting.

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A It is easy to say--

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O When you went out there in '72, did you tell them -- you only told them you expected any day to get this latter of intent or this contract, didn't you?

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A I did not say any day.

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Q You said soon.

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A I said I expected a letter of intent, the chances really looked good for it and I believed it. If I said I had a letter of intent, produce it. How could I produce it?

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There was no way.

with it, yes.

contract?

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Q Who did you go out with, Mr. Dell'Aglio?

14"

A A gentleman by the name of Mr. McCarthy.

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Q Mr. McCarthy, was he the one who was attempting to get this contract with Connecticut?

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A He worked on it. Remember, Display Sciences
was with National Off Track Viewing Corporation, a division
of Walter Reade.Walter Reade was negotiating with the State

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of Connecticut and Mr. McCarthy worked as a consultant

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for the Display with people of Connecticut to see-- to

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explain about our equipment to see if we could get further

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 Ω And he was in Connecticut trying to help get this

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MR. SPEISER: Objection, your Honor.

THE COURT: Sustained. That is the same point.

O Were you told by anybody else other than Mr.

Morgan that a letter of intent was signed by Connecticut?

A Not that I recall. I could have been.

Q Did anyone tell you other than Mr. Morgan that the contract with Connecticut was all set or words to that effect, that it was just a matter of time?

A When you say words to that effect, I am sure of that.

Q Are you finished, Mr. Hays?

A But as far as specifically saying that he out and out told me, I just can't recall whether it was that way or not. I honestly can't.

Q Who told you about the Connecticut contract other than Mr. Morgan?

MR. SPEISER: Objection, your Honor.

THE COURT · Sustained.

Now, when you told us that Display Sciences had two offices in Connecticut --

A Yes, sir, in the letter I was told that.

Q Were you told by other than the letter or other than Mr. Morgan?

THE COURT: Well, isn't the letter signed by

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	429
1	12 rdsr Hays - cross
2	Mr. Morgan?
3	MR. ROSENTHAL: Yes, but I am asking other
4	than Mr. Morgan, your Honor.
5	A Mr. McCarthy told me
6	MR. SPEISER: Objection, your Honor.
7	THE COURT: Yes, sustained. McCarthy is not
8	a defendant.
9	Q Wereyou told about the two offices by other that
0	Mr. Morgan?
1	A No, sir.
2 !	Q Were you told about any corruption in Connection
3	cut by anyone?
4	A I didn't know it was corruption.
5	Q But were you told about greasing of palms?
6	MR. SPEISER: Objection, your Honor.
7	THE COURT: You mean by Mr. Morgan?
8	MR. ROSENTHAL: By other than Mr. Morgan.
9	THE COURT: Oh, no. Sustained.
0	I suppose, Mr. Rosenthal, I should say other
1 .	than Mr. Morgan, Mr. Dell'Aglio and Mr. Danenza, because

the charge is that they all made those representations and I think you are entitled to inquire if Mr. Danenza or Mr. Dell'Aglio were told. But other than those, no. MR. ROSENTHAL: Except Mr. McCarthy has a

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curious position.

MR. SPEISER: Objection to that statement.

THE COURT: Let's go on.

O Did Mr. Dell'Aglio ever tell you who Mr.

McCarthy was or what position he had with Display Sciences?

A No, sir, I don't think so.

Q Did Mr. Morgan ever tell you that Mr. McCarthy was trying to help get the off track betting contract signed with Connecticut?

A Yes, sir.

Q And did he tell you that he got this information from Dell'Aglio?

A I don't remember that he did.

Now, did Mr. Morgan tell you that Mr. McCarthy expects to be named president of Display Sciences after this contract goes through?

A That Mr. McCarthy?

Q Yes. That he had some stake in the contract going through, that he was going through, that he was going to become a shareholder or some officer of --

A Yes, supposedly to become a shareholder.

O And all the conversations that you recall concerning the financial position of Display Sciences and the off track betting, did that come through Mr. McCarthy?

2	I am talking about the second meeting in the Spring of
3	1972.
4	MR. SPEISER: Objection, your Honor.
5	THE COURT: Sustained.
6	Q Getting to the stock, the free stock, did you
7	understand this offer of free stock to be anything but
8	a bonus?
9	MR. SPEISER: Objection, your Honor.
0	THE COURT: On what ground?
1	MR. SPEISER: He is asking for his impression,
2	did he understand.
3	THE COURT: Yes, I think that is probably
4	correct. I will sustain the objection as to form.
5	You can ask him everything he was told.
6	MR. ROSENTHAL: I understand that, your Honor,
7	but I believe that my question was improper. I will
8	change it.
9	Q This offer of free stock that you testified
0 !	to, was there anything illegal about it?
1 -	MR. SPEISER: Objection, your Honor.
2	THE COURT: Sustained.
3	MR. ROSENTHAL: Your Honor, I believe his
4	direct testimony had something to do with the legality of
5	this and I think a felse impression has been left with the

Hays - cross

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jury that there was something crooked about this.

THE COURT: Well, I don't know. I would not, over objection, have permitted Mr. Speiser to ask him whether it was legal or illegal. Are you suggesting that such a question was asked?

MR. ROSENTHAL: No, but that is one of the answers that came out, Judge, that something to do with this was illegal. I don't think anything such as that was meant.

THE COURT: You can ask for an instruction from me to the jury, if you like. But his opinion as to whether it was legal or illegal has not a thing to do in the world with this case. Let's go on.

- O Did you ever receive any free stock?
- A Nl. sir.
- O Did you know where that free stock was to come from?
 - A No, sir.
- O You didn't know whether Mr. Morgan was going to offer you the free stock or whether the company was going to offer you the free stock?
 - A I didn't know which.
- O Did you, when you heard this, expect that something was doing in violation of the SEC rules?

2	MR. SPEISER: Objection, your Honor.
3	THE COURT: Yes, same point. His opinions we
4	are not interested in.
ā	MR. ROSENTHAL: I understand.
6	O Did Mr. Morgan tell you that confidentially
7	you were going to get some free stock if you did a good
8	job of selling?
9	A Well, it was based on how much we sold, that
10	we would get a certain amount. And how much we had to
11	sell to get what amount, I don't know.
12	O Did this free stock cause you to sell any more
13	stock than normally you would have?
14	A No, sir.
15	MR. SPEISER: Your Honor, I would ask that that
16	be stricken from the record.
17	THE COURT: Well, there was no objection to
18	it so I will let it stand. Let's go on.
19	Q Now, you are a stockbroker in your own right,
20	aren't you?
21	A I was.
22	O You were licensed at that time?
. 23	A Yes, sir.
24	Q And you worked on a commission?
25	A Yes, sir.

	17 rdsr	Hays - cross
	Q	And was it the same commission that any other
-	broker wor	ked on?
1	Λ	Yes.
:	Q	And you bought stock in this company that you
:	were selli	ng?
	A	Yes.
1	Ω	There was nothing wrong with that, was there?
!		MR. SPEISER: Objection, your Honor.

THE COURT: Sustained.

And you received reports about this company from New York, did you not, such as a pink sheet, such as other reports as to its financial status?

The pink sheets, yes.

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Was there anything on the pink sheets or any other documents that you received that showed you that there was anything worng with this company, Display Sciences, that they were in receivership, that their assets had been tied up or that anything bad or untoward happened to this company?

MR. SPEISER: Before Mr. Hays responds to that question, I think it would be advisable for Mr. Hays to indicate to the jury what pink sheets are. This is the first time this term has come up.

THE COURT: All right. It can't do any harm.

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Mr. Hays, tell the jury what pink sheets are.

THE WITNESS: The pink sheets consist of the list of over-the-counter securities and what delaers deal in those particular securities, and this is what we have to go by in the over-the-counter market in finding out who makes the market in these particular stocks because they are not on the list of the Exchange. These appear daily in New York. Now, we only got them about once a week in Tulsa, but they appear daily here.

THE COURT: I suppose the paper is pink?
THE WITNESS: Yes, sir.

THE COURT: Now, Mr. Rosenthal, you didn't get an answer to that question.

Q Was there anything on those pink sheets that would lead you to believe that Display Sciences had a great deal of financial difficulty?

MR. SPEISER: Objection.

THE COURT: Sustained.

Q Was there anything on those sheets to show you that Display Sciences was in receivership?

A No, sir.

Q Would it appear --

A Not that I saw. It could have been there without me seeing it.

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i	Hays - cross
	Q You examined these pink sheets regularly,
	didn't you? I don't mean every day, but you examined them
	on and off, didn't you?
- 1	A I wouldn't examine them for that. We consulted
-	the pink sheets to find out who was quoting what price
	on the stock, that's about all, and what brokers were
	dealing in it.

In all the time you looked at the pink sheets nothing stood out about Display Sciences that you could remember?

No, sir.

Now, when you saw Mr. McCarthy, did it seem to you that Mr. McCarthy was Mr. Dell'Aglio's mouthpiece or spoke for him and was representing him in telling the financial condition and the condition of Display Sciences?

MR. SPEISER: Objection, your Honor.

THE COURT: Sustained.

MR. ROSENTHAL: Your Honor, I would like to make an offer of proof because I have concluded my examination.

THE COURT: I will give you that opportunity at the next recess.

MR. ROSENTHAL: It has to do with this witness, your Honor. I would like to do it now so it would be a

Hays - cross

complete record. If our Honor does change your mind as to the testimony 1 would have an opportunity to present it without inconveniencing Mr. Hays at all.

of it, but I will give you an sportunity out of the hearing of the jury to tell me anything you want.

MR. ROSENTHAL: Thank you, your Honor.

[At the side bar:]

offer of proof is that it is intended for an appellate court, so an appellate court can see what the proof is that you have, so they can see what was excluded, so that they can see whether you were prejudiced or not, among other things.

MR. ROSENTHAL: My understanding is it is also offered at the first instance so the Judge can see if he wants to change his opinion.

THE COURT: Go ahead.

MR. ROSENBERG: From reading the Grand Jury minutes and speaking to Mr. Hays it seems that Mr. McCarthy was speaking on behalf of Display Sciences on behalf of Dell'Aglio. He stated -- this is my understanding that Mr. Hays will testify that he stated to Mr. Mays certain things about the signing of the Connecticut contract,

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certain things about the letter of intent and also that Mr. Hays had a telephone conversation with Mrs. McCarthy concerning pretty much the same thing and about the apartments in Connecticut and all that was being done to advance this contract for the benefit of Display Sciences. And my feeling is, Judge, that a false impression has been through Mr. Speiser's testimony that all the information Mr. Hays got came through Dudley Morgan. He received 10 information from other people.

> THE COURT: If that is your offer of proof, the record will show it, but my ruling stands.

> > [In open court:]

MR. ROSENTHAL: I have no further questions. REDIRECT EXAMINATION BY MR. SPEISER:

On your cross-examination reference was made to the pink sheets and you indicated what the pink sheets were. Now, do pink sheets contain reference to the financial conditions of a company?

I really don't know.

The pink sheets that you have looked at, have you seen any indication at all as to the financial condition of the company whose stock is quoted in the pink sheets? Have you seen any reference to financial

1	22 rdsr Hays - redirect
2	conditions of companies whose stock is traded in the pink
3	sheets?
4	A There is some sort of an initial by a company
5	if something is wrong, with footnotes, I suppose. I don't
6	know. I really don't know.
7	MR. SPEISER: Thank you. No further questions.
8	THE COURT: Anything else?
9	MR. ROSENTHAL: I have no further questions.
10	THE COURT: Thank you, Mr. Hays.
11	[Witness excused.]
12	THE COURT: Does the Government's next witness
13	raise the questions we discussed shortly before we took
14	up Mr. Hays' again?
15	MR. SPEISER: The next witnesses are additional
16	salesmen.
17	THE COURT: Then we will take a short recess,
18	members of the jury. You may retire to the jury room
19	We will have to consider some matters before the next
20	witness.
21 :	[Jury leaves the courtroom.]
22	THE COURT: All right, are these witnesses
23	in the witness room?
24	MR. SPEISER: Yes, your Honor. I just wanted

to indicate to you the first time I was aware Mr. Rosenthal

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joint venture in Connecticut with Walter Reade?

And did he ever say anything to you about the

I can't specifically say that Mr. Dell'Aglio

mentioned that, no.

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Q. Did Mr. McCarthy mention it?

MR. SPEISER: Objection, your Honor.

THE COURT: As to Mc Carthy, yes. Sustained.

Q Did anybody mention it?

A Yes, sir, it was mentioned.

Q Was it Mr. Morgan who was the only person who mentioned it?

A As far as I can recall he was the only one who talked to me about it.

Q What about at these meetings when Mr. Dell'Aglio and Mr. McCarthy were in Tulsa?

A I don't think it was mentioned then. The only purpose of that meeting was to introduce Mr. McCarthy to us as the possible future president of the company.

Q And did Mr. Dell'Aglio tell you what he was doing at that particular time to help Display Sciences?

A If he did, sir, I don't recall what it was.

O You don't recall that he told you that Mr.

McCarthy was the one who was responsible for trying to
get the contract with Connecticut?

A No, I don't recall that. The only thing I might recall would be that he had worked with business people along that line, and this was one purpose of his being

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twenty minutes to five when I will have another matter.

I inform you, ladies and gentlemen of the jury, you will be excused until 9:30 tomorrow morning.

Don't discuss the case on trial amongst yourselves or with anybody else. Thank you very much and good night.

[Jury leaves the courtroom.]

THE COURT: Now, Mr. Rosenthal, if you can remember the times I disagreed with you and you want to state your reasons, I will give you a chance now.

MR. ROSENTHAL: Judge, a few of them were corrected by Mr. Speiser's subsequent questions. I don't think that the last number of times — the only real thing I disagreed with your Honor was the testimony concerning Henry McCarthy. I would point out to your Honor the new rules of evidence where hearsay is admissible if there is a substantial chance of reliability. It is based on a number of Supreme Court cases. The one that comes to mind is Davis v. Lasker, where the rules of hearsay testimony and other testimony has been expanded to give a wider latitude on cross-examination. I feel that Mr. McCarthy — what Mr. McCarthy said in representing Display Sciences or presenting himself as Display Sciences is and, of course, Mrs. McCarthy, not because a husband is bound by what his wife say, but because of the way it was said

102 rdsr

should have been permissible on cross-examination.

THE COURT: I am not so much concerned about the hearsay rule. I am often prepared to take a liberal view of that. What I am concerned about is relevance and what McCarthy did or did not say hadn't a thing in the world to do with the case on trial. He may be guilty of fraud himself, but his guilt or innocence is not here and won't be submitted to this jury.

So I am afraid we will never be able to agree on that.

MR. ROSENTHAL: Excpet, your Honor, and this is the only reason I feel it is important, because Mr. Morgan contends that all his information came from other sources and Mr. McCarthy was another source from where his information comes from. I don't care about Mr. McCarthy's guilt or innocence or his alleged corrupt activities in Connecticut. That is not my concern. Of course, if I can show Mr. McCarthy guilty and give the jury another scape goat, I would be very happy but that is not my primary concern. My primary concern is that the salesman's information came from a source other than Mr. Morgan. They testified it came from Mr. Morgan and that is my only reason for bringing Mr. McCarthy into the picture, your Honor.

THE COURT: Mr. Clerk, the case on trial --

1	73 rdsr	Brinkley - cross
2	Q	Have you generally followed Mr. Hays' advice
3	on these s	tocks?
4	A	Yes, sir.
5	Q	And in relation to this stock were you ever
6	present wh	en the principals from Display Sciences came
7	Oklahoma?	
8	A	Yes, sir.
9	Q	Do you remember approximately what time this
10	was?	
11	А	I don't recall.
12	Q	Was it in 1972 sometime?
13	A	I don't recall, it could have been.
14	Q .	Do you remember the names of the persons who
15	came to Tu	lsa?
16	A	I don't recall.
17	Q	Would the name of Frank Dell'Aglio refresh
18	your memor	y?
19	A	It doesn't.
20	Ω	What about Henry McCarthy?
21	Α	That name does have, let's say, some
22	Q	It has some ring that you remember?
23	λ	Some ring, right.
24	Q	Did Mr. McCarthy say anything about Display
25	Sciences th	nat you recall?

1	74 rdsr Brinkley - cross
2	A I don't recall but I am sure he did.
3	Q Were other people present when you were told
4	by Mr. McCarthy anything about Display Sciences?
5	MR. SPEISER: Objection, your Honor.
6	THE COURT: Sustained.
7	Q Were other people present? I will take out
8	the middle of that question.
9	A Yes, sir.
10	Were you shown a temonstration of the machine?
11	A At which time?
12	Ω At any time that you can recall.
13	A 'es, sir.
14	Q Do you recall if Mr. McCarthy was there when the
15	machine was shown?
16	A I do not recall.
17	Q Were you in any way influenced by what was
18	told to you by Mr. McCarthy?
19	MR. SPEISER: Objection, your Honor.
20	THE COURT: Sustained.
21	Q What about the machine, were you impressed by
22	the machine?
23	A Not completely.
24	Q But along with the information you received
25	from Mr. Hays you thought it was a good investment?

O How much money did you invest for your mother in this stock?

I made a sheet out with the dates and shares so

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SOUTHERN DISTRICT COURT REPORTERS. U.S.

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I can give you the exact amount.

MR. ROSENTHAL: May the record note I handed M Morgan some papers which he is looking at right now.

THE COURT: All right.

A I know she owns as a matter of record 9900 sharm My sheet here goes through the period of February 25, 197 at which point she owned 8,500, but another 1,400 was purchased after that. So all in all I would say she had very close, if not exactly, about \$33,000 in Display Sciences.

THE COURT: When did you make your is estment Display Sciences?

THE WITNESS: Sir, my first investment was in November 1970 and continued on in '71, '72 and I even ma a purchase as late as very early 1973, in January, maybe very early February.

MR. ROSENTHAL: Your Honor, at this time I mothat all these stock certificates be marked in evidence collectively.

THE COURT: Any objection?

MR. SPEISER: May I look at them very, very briefly, your Honor?

THE COURT: Of course.

[Pause.]

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a very few weeks.

Mr. Morgan, I show you Government's Exhibit 76 and 76A. What are they?

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This is dated May 13, 1972, both of them are. A

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No. It was within a month of this date or less than a month of this date.

Around this period how often did you speak to Mr. Dell'Aglio?

A I would say it might be twice a week or I may skip a week. I would be calling him, he would be calling

You state that the company only has 325,000 shares outstanding.

Yes, I did.

THE COURT: Wait, What is the question? MR. ROSENTHAL: I didn't get to it, Judge. I am getting a little tired and I am a little slower than

Where did you get that information?

I got this, and it is in error.

Please, Mr. Morgan. It will make it a lot Q easier for me and I won't be as tired. Where did you get the information?

I got it from either McCarthy or Dell'Aglio or Goldsmith and I don't remember which one.

MR. SPEISER: Objection, your Honor.

THE COURT: I don't understand the ground of the objection.

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THE COURT: All right, Mr. Speiser.

MR. SPEISER: Before I address my questions

to Mr. Roberts may I approach the #lde bar?

THE COURT: All right.

(At the side bar.)

MR. SPEISER: I am doing this so as to avoid the possibility of reversible error. I have been told by the Tulsa Police Department that Mr. Morgan has been arrested in 1968 for public drunkenness, resisting arrest and assault. In 1957 he was arrested for public drunkenness and assault. I would like to have an advisement from you whether you think these questions would be proper to address to Mr. Roberts who is appearing here as a character witness.

MR. ROSENTHAL: Both of them occur out of domestic problems. His wife had him arrested at that time for these problems. They were domestic problems.

THE COURT: Mr. Speiser, of dourse Rule 405(1) says that "On cross examination inquiry is allowable into relevant specific instances of conduct."

Our problem is does assault -- are they both for assault?

MR. SPEISER: Two for assault, one for

And are you registered with the SEC as a registered representative?

Yes.

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Now, since 1958 have you ever been suspended from trading at all in your capacity as a registered representative?

> Λ No.



his response as to what brokers at large would do. I 4 am asking him what his obvious practice is.

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THE COURT: The part of the answer after the word "yes" is stricken on your motion.

Q Now, Mr. Roberts, if Mr. Morgan knew that Display Sciences was in receivership at the time he was selling these shares of Display Sciences stock between May and July of 1972 and didn't tell that to his customers, would your opinion of him change at all?

HR. ROSENTHAL: I would object to that, your Honor.

THE COURT: No, I will permit it.

HR. ROSENTHAL: Your Honor, I understand what Mr. Speiser is doing but I do not think that is proper.

THE COURT: He says "if."

MR. ROSENTHAL: I understand the assumption, your Honor, but my understanding of the law is that I do not think this is a proper question. . If your Honor disagrees with me, other judges have disagreed with me in the past too.

> THE COURT: I will permit it.

Would you please restate the quanti A

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A I think the bill was not paid for several months and the best I recall Mr. Morgan and I split the bill.

It was supposed to have been paid for in Philadelphia.

- Who was supposed to have paid for the bill?
- A The Philadelphia people.
- Who was supposed to have paid for the bill?
- A The Philadelphia people.
- You mean Display Sciences?
- A I didn't know what their connection was.
- Horgan change?
 - A Certainly.
- Q It would. And did Mr. Morgan have any conversations with you about the financial shape of Display Sciences?
 - A No, sir.
- You bought some shares -- those certificates of 1500 shares, there is a stamp of May, 1972, correct?
 - λ Yes.
- Now, at the time you bought those shares did Mr. Morgan solicit you to buy them or did you go to him

Now, Mr. Bogart, if Mr. Morgan had sold shares of stock in a company and at the time he sold you those shares he knew that the company was in receivership but didn't tell you that fact, would you change your opinion about Mr. Morgan?

A I sure would.

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of the court's charge.

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Will the marshal see that the door is locked, please.

THE COURT: Madam foreman, ladies and gentlemen

of the jury: This case is now about to be submitted to you for your decision as jurors on the issues of fact involved, and of course your decision as to those issues determines whether your verdict as to this defendant will be guilty or not guilty.

In making your decisions you act as ministers of justice and you discharge an obligation of citizenship which is sacred.

In making your decisions you ought to adopt an attitude of complete fairness and impartiality. You should appraise the evidence calmly and objectively and without any bias or prejudice for or against the government or for or against the defendant. You are the sole and exclusive judges of the facts. You determine the weight of the evidence and the credibility of all witnesses. You decide all conflicts and differences in the evidence and you draw whatever reasonable inferences may properly be drawn from the facts as you may find the facts to be.

My function at this point is to give you instructions as to the applicable law. Your duty is to accept and to follow my instructions and apply them to the facts as you may find those facts to be.

In determining what are the facts you must rely upon your own recollection of the testimony and other evidence.

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What I may say as to any fact during these instructions and what counsel have said in their closing arguments yesterday, and at every other point during the trial, is not evidence and is not to be taken in place of your own recollection, which is what controls. The fact that rulings have been made during the trial, objections have been sustained or objections overruled, should not be taken by you as any indication of any view by the court as to what your decision should be as to the guilt or innocence of the defendant. You are not to assume that I have any opinion as to the guilt or innocence of the defendant or as to the truth or falsity of any of the charges. Rulings made during the trial on objections as to the admissibility of evidence, whether objections by the government or for the defendant, are not to be considered by you in any respect. And in this connection I should say, members of the jury, that counsel not only have the right but they have the duty to press whatever legal objections there may be to the admissibility of evidence. I would also remind the jury that it is only the answer which is evidence and never the question. I would remind the jury further that what is said between court and counsel should be disregarded by the jury. You must remember, too, that judges are also human and from time to time I have been impatient with counsel. That is a fault on

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my part and you are asked to forgive and to disregard it. Counsel on both sides have been able and devoted and their teal on behalf of their respective clients is commendable.

Now, members of the jury, the fact that the government is a party and that the prosecution is brought in the name of the United States of America does not entitle the government or its witnesses to any greater consideration than that shown to the defendant. At the same time, the government and its witnesses are entitled to no less consideration. All parties, government and individuals alike, stand equal before this bar of justice.

The indictment, as I am sure I reminded the jury when you were selected, is an accusation. It is a charge. It is not evidence and no proof as to the guilt of the defendant. You should give no weight to the fact that an indictment has been returned against the defendant. He has pleaded not guilty. The government has the burden of proof and that burden is to establish the charges beyond a reasonable doubt. It is a burden that never shifts and it remains on the government throughout the trial.

A defendant does not have to prove his innocence. On the contrary, he is presumed to be innocent and the presumption of innocence disappears only if and when you, the jury, are satisfied that the government has proved the charges

beyond a reasonable doubt. In weighing the evidence to

determine whether there has been proof beyond a reasonable

doubt, you should consider the quality and the substance

of the evidence and not the quantity or the number of witnesses

On some occasions I have asked questions of some of the witnesses. This was only in an effort to make some point clearer for the jury, and the questions are not to be taken as any indication that the court has any opinion whatever as to the guilt or innocence of the defendant or as to the credibility of any witnesses.

Now, you have heard the expression "reasonable doubt." I shall try to define it for you. A reasonable doubt is a doubt founded on reason and arising from the evidence or the lack of evidence. It is a doubt which a reasonable person has after carefully weighing all the evidence. It is a doubt which is substantial and not merely shadowy. Reasonable doubt is the which appeals to your judgment, your reason, your common sense, your experience. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant. A reasonable doubt is not a vague, speculative, imaginary doubt but such a doubt as would cause prudent people to hesitate before acting in matters of importance to themselves. Proof beyond a reasonable doubt does not mean proof beyond all possible

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doubt. If that were the rule, few men or women, however guilty, would ever be convicted because it is virtually impossible to prove and to convince a person of any controverte fact which is not capable of being proved to a mathematical certainty.

In consequence, the law in a criminal case is that it is sufficient that guilt be proved beyond a reasonable doubt and not beyond all possible doubt.

Now, members of the jury, before I read the specific language of the statutes which the defendant, Mr. Morgan, is charged with violating and before I read the various sections or counts of the indictment it is desirable at this point to say something about the history and purpose of some of the statutes so that they will become more meaningful to you. The charges in counts 33 and 34 involve federal securities laws which were enacted by Congress co protect the investing public in the purchase and sale of securities which are publicly distributed. Congress, mindful of the many schemes, artifices and devices which might be used to defraud the investing public and which had been used before the great stock market crash in 1929 enacted the Securities Act of 1933 to govern the various aspects of the issuance of securities to the investing public. And Congress also enacted the Securities Exchange Act of 1934

to provide for the regulation of securities exchanges and over-the-counter markets to prevent inequitable and unfair practices on such exchanges and over-the-counter markets and for other purposes.

Any deceptive practice, whether it be the misstatement or omission of material facts or other such practices, defeats the function and purpose of a true and a free market.

Another statute which comes into play in this case is designed to prevent the use of the mails in schemes to defraud the public. It is against this background which we should turn from to consider the specific charges against the defendant.

First let me say that the fact that other defendants are named in the indictment— who are not here on trial and that there are counts in which Mr. Morgan is not named and which, therefore, are not being submitted to you, are matters with which the jury should have no concern whatever. Under our system of justice guilt is personal and individual, and you must, therefore, consider only whether the government has proved each of the charges against Mr. Morgan, according to the instructions which I am now giving you, and not whether others may have been proved guilty or others charged.

Now, counts 6 through 11 and 15 through 21 charge the

defendant Dudley Morgan and others who are not here on trial with violations of the general mail fraud statute which prohibits the use of the United States mails in furtherance of a fraudulent scheme. We can call these the mail fraud counts. The statute applicable to the mail fraud counts provides in relative part as follows:

"Whoever having devised or intending to devise
any scheme or artifice to defraud or for obtaining money
by means of false or fraudulent pretenses, representations
or promises for the purpose of executing such scheme or
artifice or attempting so to do, places in any Post Office
or authorized depository for mail matter any matter or thing
whatsoever to be sent or delivered by the Postal Service
or knowingly causes to be delivered by mail according to
the direction thereon any such matter or thing, is guilty
of an offense."

The charge in counts 6 through 11 and 15 through
21, based upon the foregoing statute, the statute from
which I have just read, as returned by the Grand Jury, reads
as follows:

"The Grand Jury charges, 1, from on or about

March 20, 1972, up to and including October 25, 1972, in the

Southern District of New York," and I should say that the

Southern District of New York includes New York County, the

island of Manhattan, Bronx County and the rest of New York

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up the Hudson River on both sides to the southern border of Albany County," in the Southern District of New York and elsewhere, Victor Danenza, Frank Dell'Aglio, Dudley Morgan and Triple," which refers to Triple Management, a corporation, "The defendants, unlawfully, wilfully and knowingly did devise and intend to devise a scheme and artifice to defraud the purchasers and would be purchasers of Display common stock," that is Display Sciences common stock, "and to obtain money and property from said persons by means of false and fraudulent pretenses, representations and promises.

"2, it was a part of said scheme and artifice
to defraud that unregistered shares of Display common stock
would fraudulently be offered for sale and would be sold
to the investing public without a registration statement
being in effect with the Securities and Exchange Commission
with respect to such shares.

"3, the allegations contained in paragraphs 1, 5 and
7 of count 1 of this indictment are hereby repeated and incorporated as if fully set forth herein."

And I go back to count 1 and read those incorporated paragraphs.

"1. At relevant times defendant Frank Dell'Aglio
was president and a director of Display Sciences, Inc.,
hereinafter Display, a New York corporation engaged in the

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business of assembling and selling widescreen projectors.

At relevant times Display had its principal offices in New
Jersey or Pennsylvania.

Another incorporated paragraph, "5, at all relevant times defendant Victor Danenza employed and utilized defendant Triple Management, Inc., hereafter Triple, a corporation he caused to be incorporated in New York in December, 1971, for the primary purpose of secretly trading in securities for his personal benefit. By disguising his control of defendant Triple, defendant Danenza was able, among other things, to evade his obligation and dut, to file income tax returns for Triple.

"7, at all relevant times defendant Dudley Morgan served as manager of the Tulsa, Oklahoma, office of the brokerage firm of Van Alstyne Associates, Inc."

Now, continuing with these counts.

"4, among the means by which the defendants would and did carry out said scheme and artifice to defraud were the following:

A, on or about March 20, 1972, defendants Danenza and Dell'Aglio informed defendant Morgan of the means by which defendant Triple acquired 90,000 shares of Display common stock and defendants Morgan, Dell'Aglio and Danenza then discussed the need for defendant Morgan to sell enough

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shares of Display common sto . to raise the funds necessary to enter into a settlement agreement with Display creditors so that display would no longer be in receivership in New Jersey.

"B, from on or about April 21, 1972, up to and including October 25, 1972, defendants Danenza, Dell'Aglio, Morgan and Triple, directly and indirectly, prepared and caused to be prepared, distributed and caused to be distributed to purchasers and prospective purchasers of Display common stock information and sales literature containing the following false, fraudulent and misleading statements and representations:

"1, on April 11, 1972, it was stated the final contract with Connecticut would be forthcoming and should be approved within the next two weeks.

"2, on June 5, 1972, it was stated a publicity release should be received this month with the simultaneous signing of the offtrack betting contract with the State of Connecticut.

"3, Display had only 525,000 shares of common st :k outstanding on May 15, 1972.

"C, during the course of the said scheme and artifice to defraud, defendants Danenza, Dell'Aglio, Morgan and Triple concealed and caused to be concealed and

omitted and caused to be omitted from disclosure to purchasers and prospective purchasers of Display common stock the following material information.

"1, that Display had been ordered into voluntary receivership on November 10, 1971, by a New Jersey state court upon the ground that Display had become unable to pay its debts.

"2, that Display continued in receivership for a portion of the period during which the defendants offered and caused to be offered and sold and caused to be sold Display common stock to purchasers and prospective purchasers.

"3, that a substantial portion of the moneys received or to be received by the defendants from the sale of Display common stock pursuant to the scheme and artifice to defraud was being used and was to be used to finance a settlement agreement with Display's creditors.

"4, that defendant Morgan had offered and promised to give to his salesman without charge Display common stock as an incentive to their selling said stock to their customers.

"5, for the purpose of executing said scheme and artifice to defraud and attempting to do so, the defendants Damenza, Dell'Aglio, Morgan and Triple did place and cause to be placed in Post Offices and authorized

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depositories for mail matter and did cause to be delivered by mail according to the directions thereon certain matter to be sent and delivered by the United States Postal Service.

"6, on or about the dates hereinafter set forth in the Southern District of New York, said defendants unlawfully, wilfully and knowingly, in furtherance of the aforesaid scheme to defraud, did cause to be delivered by mail by the Postal Service, according to the direction thereon, from the offices of Van Alstyne Associates, Inc., 4 Albany Street, New York, New York, to the persons hereinafter set forth the matter hereinafter set forth."

And then follow the counts and the individuals and the matter. The matter in each case charged as having been placed in the mails is a confirmation of purchase of shares of Display common stock.

Count 6, May 6, 1972, Paul Baker; count 7, May 17, 1972, Robert Baker and Nancy Baker; count 8, May 17, 1972, Baker group, care of Robert Baker; count 9, May 18, 1972, Charles R. Benjamin; count 10, May 18, 1972, Paul H. Brinkley and Grace W. Brinkley; count 11, May 19, 1972, David Burton; count 15, May 19, 1972, H. David Collins, count 16, May 18, 1972, Jerry Clark and Hazel Clark; count 17, May 17, 1972, R. Paul Heap; count 18, July 12, 1972, Edith Kovats;

count 19, May 17, 1972, David Prater; and count 21, Hugh E. Smith and Cleo G. Smith.

Now, the defendant by his plea of not milty has put in issue the charges in each of these counts, and I should say, members of the jury, that you need not try to remember what each count is, nor under what statute it is labeled. You will be given a copy of the indictment for using during your deliberations and you will also be given a memorandum for use in returning your verdict.

Now, for a conviction on any of the mail fraud counts of the government must establish to your satisfaction beyond a reasonable doubt these two essential elements.

"1, that the defendant, alone or with others, wilfully and knowingly devised or intended to devise a scheme to defraud or a scheme to obtain money by false pretenses; that is, false statements.

2, that the defendant, himself or through others, wilfully and knowingly placed something in the mails, a letter or anything else, or caused something to be sent or delivered by the mails for the purpose of executing the scheme or attempting to do so."

Now, the first of these two essential elements contains an alternative; that is, either, A, a scheme to defraud, or B, a scheme to obtain money by false statements. If you

or intended to devise either type of scheme, this is sufficient, so far as the first element is concerned. The word "scheme" as used in the law means essentially a plan or course of action. The indictment describes the scheme with which the defendant is here charged, but it is not necessary for the government to prove all of the details of the scheme as described in the indictment. If the government proved to your satisfaction beyond a reasonable doubt one or more aspects of the scheme and that such a scheme composed of the aspects you find was a scheme to: defraud or to obtain money by false pretenses, then this is sufficiently so far as this essential element of the scheme is concerned.

To defraud means to deprive somebody of something by trick, by deceit, by chicanery, by overreaching, by false statements. Thus a scheme to defraud means a plan to deprive someone of something of value, by trickery or deception, by false statements.

Now, a statement may be false if known to be untrue or if made with reckless indifference as to its truth or falsity, or made or caused to be made with the intent to deceive. A false statement may be made by half truths or by the concealment of material facts.

If a statement is made with intent to deceive, it is no defense that the defendant hoped or optimistically expected that the statement would at some time prove to be true. A pretense, representation or promise is fraudulent if it was falsely made or caused to be made with the intent to deceive. It is not an element of the offense that anybody actually suffered a loss or that the defendant realized a financial gain. In other words, to be a scheme to defraud, as used in the statute, the scheme need not be effective or practicable or turn out to be successful. The offense is complete if the defendant, alone or with others, devised or intended to devise a scheme to defraud or to obtain money by false pretenses, and if the mails are used to execute or attempt to execute such scheme.

To an act which fully means to do it knowingly and deliberately and with a bad purpose and a motive. In determining whether the defendant has acted wilfully it is not necessary for the government to establish that the defendant knew he was breaking any particular law.

In determining whether the defendant has acted wilfully you should consider whether or not he knew that the relevant pretenses or statements were false.

Now, a moment ago I explained when a statement may be considered false. In this connection if a statement is

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false and if the defendant did not know it was false, he would nevertheless be acting wilfully if he deliberately closed his eyes to facts he had a duty to see, or if he recklessly stated as facts things of which he was ignorant.

Now, we dealt with the word wilfully. The other word I used was knowingly. To do an act knowingly means simply to do it voluntarily and intentionally and not because of mistake or accident or some other such innocent reason.

Now, you will recall that the second essential element of the mail fraud offense is that the defendant himself or through others wilfully and knowingly placed something in the mails or caused something to be sent or delivered by the mails for the purpose of executing a scheme or attempting so to do. It must, of course, be shown as to each mail fraud count that something was put in the mails, but it is not necessary to show that the defendant himself put something in the mails. It is enough if he caused it to be done. And if he knows that a letter or confirmation or something else will be put in the mails in the ordinary course of business or if it can reasonably be foreseen as naturally and probably being put in the mails, then he has caused the mails to be used.

The same mail need not contain any false statement

nor disclosed and intent to defraud nor show on its face that it was mailed in furtherance of the scheme, but it is necessary for a conviction that you find beyond a reasonable doubt that the thing was mailed or caused to be mailed by the defendant himself or through others for the purpose of executing or attempting to execute the scheme charged in the indictment.

The government does not have to prove that the mailings were made on the exact dates charged in the indictment.

It is enough that the evidence established beyond a reasonable doubt that the mailings were on a date reasonably near the dates alleged in the indictment.

In making your decision you should consider all the evidence, but you should consider and decide each count separately. As to each count the government must prove the two essential elements beyond a reasonable doubt before there may be a finding of guilty.

Each separate count being submitted to the jury charges a separate offense and a separate use of the mails, and if in fact there is a scheme to defraud or to obtain money by false pretenses, then each separate use of the mails to execute or attempt to execute that scheme is a separate offense.

Now, members of the jury, thus far I have instructed

you by an explanation of the essential elements of the mail fraud offense by a principal, that is, a person who himself commits the events. In the submission of this case against Mr. Morgan the government also relies on another statute, sometimes called the aiding and abetting statute. This is Section 2 of Title 18 of the United States Code, and it reads as follows: "Principals: A, whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.

B, whoever wilfully causes an act to be done, which if directly performed by him or another, would be an offense against the United States, is punishable as a principal."

This means that not only is the person who commits an illegal act, a person usually called a principal, guilty, but anyone who aids and abets him in the commission of the act is likewise guilty of committing that illegal act.

In order to find that the defendant aided or abetted another to commit the offenses charged in this indictment, you must find that the defendant in some way associated himself with the criminal scheme charged, that he participated in it as something that he wanted to bring about, that he by his act or acts endeavored to make it succeed. In

determining this question you may consider whether the defendant had an form of financial stake in the scheme, since a financial interest in the outcome of a crime is insignificant as to motive.

any act designed to promote or further the scheme, even of relatively slight importance which you find was committed by the defendant. But to find the defendant guilty of aiding and abetting you must find something more than mere knowledge on his part that a crime was being committed, since a mere spectator at a crime in not a participant. It is not necessary, however, to find that the defendant himself did any of the acts since participation in the crime can, for example, be found if you find that he aided and abetted another to commit a crime.

Now, to this point, madam foreman. members of the jury, we have mentioned several times the word "intent."

As to this matter I should say to you that intent involves a person's state of mind, and while this is a fact it is a fact which is not possible to prove by direct evidence, short of an expressed admission by defendant. That is because, of course, you cannot look into a person's mind. However, like any other fact, intent may be proved by circumstantial evidence and proof of the circumstances surrounding the

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transaction may supply an adequate and convincing basis for finding the intent of the defendant.

I just used and you have undoubtedly heard it many times in the past. It may be well, however, to say a few words about the difference between the two types of evidence, direct and circumstantial evidence. Direct evidence is where a witness testifies to he or she saw, heard, observed, what he or she knows of his or her own knowledge, something which came by virtue of the senses. Circumstantial evidence is evidence of facts and circumstances from which one may infer connected facts which reasonably follow in the common experience of mankind.

Perhaps we can make it somewhat plainer by referring to an example which is frequently used in this courthouse. You will recall in the old story of Robinson Crusoe how one day he saw footprints in the Isand on the beach. He did not see a man walking on the beach but he immediately drew an inference fron the fact of the footprints that a man had in fact been walking on the beach, and that is about all there is to circumstantial evidence. You infer on the basis of reason and experience from an established fact the existence of some further fact.

Now, members of the jury, since and essential

element of the crime is a specific intent to defraud, it
follows that good faith is a complete defense to the crime
of mail fraud. What I am about to say on the subject of good
faith applies also to the securities fraud counts, counts 33
and 34, which I will discuss a little later in my instructions.
However misleading or deceptive a plan may be the use of the
mails does not constitute a crime if the plan was devised
in good faith. Honesty and good faith on the part of the
defendant is a good defense to the charge contained in all
counts of the indictment. And honest belief by a defendant
in the truth of the representations made is a good defense,
However inaccurate the statement may turn out to be.

If you find that the scheme was successful, that is, that the defendants secured an advantage by the transactions that are the subject of the scheme, this may be considered by you on the issue of good faith and criminal intent.

On the other hand, while the fact that the defendant did not prove it or indeed lost money by reason of the claimed fraudulent transactions does not in and of itself reflect innocent conduct, it may be considered as reflecting that he acted in good faith or without criminal intent.

As a practical matter then, in order to sustain the charges against the defendant, the government must establish

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 beyond a reasonable doubt that he knew that his conduct as a participant in the scheme was calculated to deceive and nonetheless he associated himself with that scheme.

Now, in considering whether or not a defendant acted in good faith you are instructed that a belief by a defendant, if such a belief existed, that ultimately everything would work out so that no one would lose any money does not require a finding by you that he acted in good faith. No amount of honest belief on the part of a person that the enterpise will ultimately succeed in such a way that no one will suffer any loss will excuse fraudulent actions by him or false representations, if you do so find.

As I believe I have already stated, the government can also meet its burden that a defendant knowingly and wilfully participated in a scheme to defraud if it establishes beyond a reasonable doubt that the defendant acted with a reckless disregard of whether the statements and representations, if you do find these were made, were true or false or with a conscious purpose to avoid learning the truth, unless you find that the defendant in fact believed that the pretenses and representations were true.

In determining whether the defendant acted in good faith or with intent to defraud, you should consider all the facts and surrounding circumstances and the reasonable

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inferences to be drawn therefrom. Knowledge of falsity and specific intent to defraud or deceive is an essential element of the crime charged under the mail fraud counts and also under the Securities Act counts, counts 33 and 34.

Accordingly, if you find that the defendant lacked such knowledge or lacked such intent or that he acted in good faith, this would be a defense.

Now, madam foreman, ladies and gentlemen of the jury, let us turn to count 33. This count charges the defendant Morgan and others who are not here on trial with a violation of a section of the Securities Act of 1933. This act is often called the 1933 Act, and we can call count 33 the 1933 Act count. Now, the relevant section of the 1933 Act provides

or sale of any securities by the use of any means or instrument of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly, 1, to employ any device, scheme, or artifice to defraud; or 2, to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact, necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading. Or 3, to engage in any transaction, practice

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or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Now, let's read count 33.

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"The Grand Jury further charges, 1, from March 20, 1972, up to and including October 25, 1972, in the Southern District of New York and elsewhere, Victor Danenza, Frank Dell'Aglio, Dudley Morgan and Triple, the defendants, unlawfully, wilfully and knowingly, in the offer and sale of securities, to wit, shares of Display common stock, by use of the means and instruments of transportation and communication in interstate commerce and by the use of the mails, directly and indirectly did, A, employ devices, schemes and artifices to defraud; B, obtain money and property by means of untrue statements of material facts and b means of omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and C, engage in transactions, practices and courses of business which would and did operate as a fraud and deceit upon the purchaser and would be purchasers of said securities.

2, the allegations contained in paragraph 1, 5 and 7 of count 1 of this indictment are hereby repeated and incorporated as if fully set forth herein. The allegations contained in count 4 through 21 of this indictment are hereby

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and incorporated as if fully set forth herein as constituting and describing some of the means by which the defendants committed the events charged in this count.

3, on or about the dates hereinafter set forth in this count in the Southern District of New York, said defendants, unlawfully, wilfully and knowingly, directly and indirectly did use and caused the means and instruments of transportation and communication in interstate commerce and the mails, pursuant to and in furtherance of the scheme alleged in paragraph 1 of this count, by causing confirmations of purchase of Display common stock to be mailed from the offices of Van Alstyne Associates, Inc.,

4 Albany Street, New York, New York, to the persons hereinafter set forth."

And then follows a list of the mailings substantially the same, I believe, as in the mail fraud counts.

Now, as you have heard, Mr. Morgan, the defendant, has pleaded not guilty to this count also and that raises the issues here to be tried. In order to sustain the charge in count 33 the government must establish beyond a reasonable doubt the following essential elements:

l, that in the offer or sale of Display securities
to one or more of the investors listed in couth 33 any
one of the following occurred: A, a device, scheme or artifice

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obtained from the purchasers of Display stock by means of untrue statements of material facts or omissions to state material facts which in themselves become misleading in the light of the circumstances; or C, fraudulent conduct was engaged in with respect to the offer or sale.

The second essential element is that the defendant

Morgan wilfully and knowingly participated in or aided

and abetted the aforesaid fraudulent conduct with intent

to defraud in the sale of Display securities. And the

third essential element is that there occurred the use of the

mails or any means or instrument of interstate transportation

or communication in furtherance of the scheme.

As to the first element, that is, the existence of a device, scheme or artifice to defraud or the obtaining of money or property by means of untrue statements of material facts or omission to state material facts or any fraudulent or deceitful conduct, the language, it is believed, is almost self-explanatory. It is not necessary that the government establish all three categories of prohibited acts in connection with the overall sale of Display stock to the public investors. Any one of them is sufficient if you do so find.

As I stated in connection with the mail fraud counts,

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a device, scheme or artifice is merely a plan for the accomplishment of any objective. Then, to defraud is to deprive somebody of something of value by trickery or deceit, by false statements. Whether by false representations or statements of material facts, omissions to state material facts, suggestions or suppression of the truth. A scheme to defraud is any plan, device or course of action to obtain money or property by means of false or fraudulent pretenses, untrue statements of material facts, omissions to state material facts, representations, promises, course of action or conduct calculated to deceive persons of average prudence.

reasonably prudent investor might attach importance in deciding whether or not to buy shares of stock. If there is deception, the manner in which it is accomplished is immaterial. The government has alleged that paragraph 4 of the mail fraud counts describes some of the means by which the scheme to defraud was committed. It is not necessary for the government to prove all of the pretenses, misrepresentations or concealments specified in the indictment. Nor need the government prove all of the means charged in paragraph 4 of the mail fraud counts which are incorporated in count 33 by reference in order to prove the scheme to

defraud alleged in count 33 of the indictment.

And again, it is immaterial whether the alleged unlawful scheme was successful or not or whether any purchaser of Display stock mentioned in count 33, or the defendant profited or lost by reason of the alleged scheme to defraud. That is not an element of the crime charged, that is, profit or loss. But those matters may be considered, as I discussed earlier, on the issue of good faith.

Now, madam foreman, ladies and gentlemen of the jury, the law puts an obligation upon a seller or a dealer who undertakes to state a fact or facts about a security, to do so in such a way or manner as not to give a distorted picture of the facts or to make any statement actually uttered misleading. When a broker-dealer chooses to speak about a stock it can be said that there is an obligation on his part to state all of the facts which are necessary to a proper understanding of that particular stock which is being discussed. And I point out that false statements or omissions must relate to material matters.

You must determine with respect to each false statement, if you do so find, whether the statement was true or false when it was made, and in the case of alleged omissions whether the omission was misleading when made.

If you have a reasonable doubt whether the statement or

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omission was false or misleading at the time and under the particular circumstances in which it was made, then, of course, the government has not sustained its burden of proof as to this element. On the other hand, if you find that the government has established beyond a reasonable doubt that a statement was false or a statement was omitted, you must next determine whether the fact misstated or omitted was a material fact under the circumstances. All that is necessary in that connection is that the misstatement or omission would have been considered important by a reasonable investor in deciding whether to purchase Display common stock. It is not necessary for the government to prove that anyone mentioned in count 33 actually relied on or suffered damages as a result of any false statement or omission to state a material fact.

If you find that the government has established beyond a reasonable doubt the second essential element, then you must go on to consider the third and final element, that there occurred the use of the mails or any means of interstate transportation or communication in furtherance of the scheme. This element is satisfied if the government proves beyond a reasonable doubt either that the mails or means of interstate transportation or communication, that is, means of transportation or communication between two or more

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states were used in furtherance of the scheme.

Now, we have concluded as to count 33 and we move on to the final count, count 34. In this count the government charges the defendant Morgan and others, who are not here on trial, with a violation of Section 10b of the Securities and Exchange Act of 1934 and of Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission. The Securities Exchange Act of 1934 is often called the 1934 Act, and for simplicity we can call count 34 the 1934 Act count.

Now, the statute itself reads as follows:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails to use or employ in connection with the purchase or sale of any security registered on a national security exchange, or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission" -- that's a reference to the Securities and Exchange Commission -- "as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

The rule promulgated by the Securities and

Exchange Commission closely parallels the statute I have

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just read but is broader in scope. The rule provides that it connection with the purchase or sale of any security, such as shares of stock, "It shall be unlawful for any person directly or indirectly by the use of any means or instrumentality of interstate commerce or of the mails, 1, to employ any device, scheme or artifice to defraud; 2, to make any untrue statement of a material fact or to mit to state a material fact necessary in order to make the statements made in the light of the circumstances under which they were made not misleading; or 3, to engage in any act, practice or course of business which operates or would operate as a fraud or deceit on any person."

Now, let us read count 34.

March 20, 1972, up to and including October 25, 1972, in the Southern District of New York, Victor Danenza, Frank Dell'Agli Dudley Morgan and Triple, the defendants, unlawfully, wilfully and knowingly did, directly and indirectly, by use of means and instrumentalities of interstate commerce and the mails use and employ in connection with the purchase and sale of securities, to wit, shares of Display common stock, manipulate and deceptive devices and contrivances in contravention of Rule 10b-5 of the Rules and Regulations of the Securities and Exchange Commission.

"2, the allegations contained in paragraphs 1, 5 and 7 of count 1 of this indictment are hereby repeated and incorporated as if fully set forth herein.

"The allegations contained in paragraph 5 of counts 4 through 21 of this indictment are hereby repeated and incorporated as if fully set forth herein as constituting and describing some of the means by which the defendants committed the offense charged in this count.

the Southern District of New York said defendants unlawfully, wilfully and knowingly directly and indirectly did use and cause to be used the means and instruments of interstate commerce and the mails pursuant to in furtherance of the scheme and unlawful activity alleged in paragraph 1 of this count by causing confirmations of purchase of the common stock of Display to be mailed from the offices of Van Alstyne Associates, Inc., 4 Albany Street, New York, New York, to the persons hereinafter set forth as follows," and then follows the list of persons to whom the confirmations of purchase of Display stock were mailed.

Again, the defendant pleaded not guilty to this count and that raises the issue here to be tried.

Now, under count 34, in order to find the defendant guilty the government must establish beyond

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a reasonable doubt these essential elements.

. 1, that in connection with the purchase or sale 3 of Display Sciences stock a device, scheme or artifice to defraud was employed, or untrue statements of material facts were made, or material facts were omitted that were necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or acts and practices or courses of business were engaged in which operated as a fraud and deceit upon 10 the purchasers of Display Sciences stock. 11

The second element, essential element is that the defendant Morgan knowingly and wilfully participated in or aided and abetted the conduct with intent to defraud.

And 3, the third essential element, that the defendant used or caused to be used or aided and abetted the use of means and instrumentalities of interstate commerce, including the use of telephonic communication or the mails in furtherance of the scheme.

Now, the instructions given to you in connection with count 33 concerning a scheme to defraud, false statements of material facts, misleading omissions of material facts, knowledge, specific criminal intent, good faith, aiding and abetting and interstate communication or transportation or all equally applicable here to count 34.

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Now having read to you the indictment and explaining to you the applicable law as to the different types of counts it may be helpful to the jury if I summarized the theory of the defense to the indictment. The theory of the defense is that the defendant had no knowledge that the company, Display Sciences, was in receivership; that moneys would be used to pay off creditors; that he had no intent to defraud.

You may remember that a question was asked by a juror about receivership and bankruptcy. A receiver is a person appointed by a court, state or federal, to take possession of the property of another person or of a corporation. A receiver is a ministerial officer of the court, an arm of the court, and is normally appointed for the protection of creditors. But there are some other reasons for appointing a receiver. New Jersey, where the principal place of business of Display Sciences was located, at least for some period, has a statute which authorizes the New Jersey court to appoint a receiver on either of the following grounds, among others: that the corporation is insolvent, that the business of the corporation is being conducted at a great loss and greatly prejudicial to the interests of its creditors or shareholders. The government contends that the

evidence, specifically Exhibits 3, 3A and 9, establishes that

a receiver was appointed for Display Sciences on both those grounds and that Display was in fact in receivership for the period November 10, 1971, through July 11, 1972.

Now, among the periodic reports prepared by the Securities Exchange Act of 1934 are an annual report on Form 10-K required to be filed within 120 days after the end of the issuer's fiscal year, and current reports on Form 8-K required to be filed within ten days after the close of any month during which any of the events specified in that form occurred.

In addition to requiring detailed financial statements, Form 10-K requires disclosure of information regarding material pending legal proceedings with respect to the issuer, such as receivership, increases in outstanding securities, principal security holders and security holdings of management, the directors of the issuer, options granted to the management of the issuer to purchase the issuer's securities, and direct and indirect interest of management and others in certain transactions.

Form 8-K is required to be filed with the Commission upon the occurrence of certain events, among which are include the following: Changes in control of the issuer, material legal proceedings, increases in excess of 5 percent of the issuer's outstanding registered securities.

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Now, members of the jury, we are approaching the end of these instructions. I am sure you will be glad to hear that, but we should say a few words about the credibility of witnesses. You remember I have said that the jury alone decides all issues as to the credibility of witnesses. How do you determine whether witnesses are telling the truth? Well, as we say ordinarily, you simply used your common sense As practical men and women you draw on your own experience in everyday life, your experience in meeting and dealing with people, and on this basis you determine how you evaluate the credibility of witnesses. You may take into account inconsistencies, any conflict with the testimony of other witnesses, omissions and the like. You observe the witnesses, you heard that testimony. How did they strike you? Did their appearances seem open, fair, firm, candid? So you take each one and you determine whether you can believe them and the extent to which you can believe them. If you should and that any witness has testified falsely to any material matter here before you, you may reject all the testimony of that witness or you may accept such part as you believe or as you may find corroborated by the other evidence.

Now, evidence that a witness has one or more crimin convictions may be considered by the jury in weighing the credibility of the witness. That a person has such a

conviction does not mean that he cannot tell the truth.

It is simply a factor for the jury to consider in determining credibility. You may consider whether a witness has any interest in the case which would give any motive or bias which would affect his or her testimony, if so, you may consider that interest in weighing the credibility of that witness.

An interested witness or motivated witness is not necessarily unworthy of belief. It is simply, again, only a factor to be considered by the jury in determining his or her credibility

The law permits, but does not require, a defendant to testify in his own behalf. The defendant, Mr. Morgan, did testify in this case. Obviously, a defendant has an interest deeper than anyone else in the result of his prosecution. In fact, it seems clear that he has the greatest interest of all. And interest creates a motive for false testimony. The greater the interest, the stronger the motive, and the interest of a defendant in the result of his trial is of a character possessed by no other witness.

In appraising his credibility, therefore, you may take the fact of interest into account. However, it by no means follows that simply because a person has a vital interest in the result of his prosecution, that he is not capable of giving a straightforward or truthful account of events.

It is for you to decide to what extent, if at all, his interest

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affected or colored his testimony.

Now, members of the jury, the government called as a witness a person who openly admitted his involvement in the offenses here charged or related offenses. That was Mr. Dell'Aglio. In the eyes of the law he is an accomplice. In the prosecution and detection of crime the government of necessity is frequently compelled to rely on the testimony of accomplices. Often it has no choice in the matter. The government must take the witnesses to transactions as it finds them. An accomplice does not become incompetent to testify as a witness because of participation in the crime that act charged. If accomplices could not be used, in many instances it would be difficult or impossible to detect and prosecute wrongdoers.

Frequently it happens that only those who participal in a crime have evidence which is relevant and important in a case.

There is no requirement in the federal courts that the testimony of an accomplice be corroborated. A conviction may rest upon the uncorroborated testimony of an accomplice, if you find it credible and believable.

In this case, however, the government does claim corroboration as to various portions of the testimony of an accomplice witness. The fact that a government witness

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upon his credibility. However, it does not follow that because a person has acknowledged participation in the crime or is an accomplice or has a criminal record, that he is not capable of giving a truthful version of what occurred. His testimony should be viewed with great caution and scrutinized carefully.

You will consider whether his testimony was inspired by hostility to a defendant or by any motive of self-interest, personal advantage so that he gave false or colored testimony against him. You should consider whether the witness, on the other hand, bared himself publicly, made a clean breast of it and told the truth.

If you find that the testimony of an accomplice was untruthful, you should reject it. On the other hand, if after a careful and caution examination you are satisfied that the witness has given a truthful account of what occurred and that the government has sustained its burden of proof in all other respects, as outlined in my instructions, then you have sufficient proof upon which to bring in a verdict of guilty.

Now, members of the jury, the defendant has

called witnesses who have testified to his reputation

for truth, honesty and integrity or to their opinion of such

matters. These are often called character witnesses, although
you appreciate that they are testifying to reputation or
opinion rather than to character. A character trait may
only be shown by evidence of reputation or opinion and not,
for example, by showing that the defendant has never been
convicted of any crime. In any event, you should consider
the evidence of reputation or opinion or these traits of
character together with all other evidence in determining
the guilt or innocence of the defendant.

Evidence of good reputation for a relevant trait or opinion evidence as to such trait may in itself create a reasonable dubt where, without such evidence, there would be no reasonable doubt. But if from all the evidence you are satisfied that the defendant is guilty, a showing that he previously enjoyed a good reputation for truth, honesty and integrity or that the witnesses were of the opinion that he had such traits is no excuse or defense, and you should not acquit him merely because you believe he has been a person of good repute or that witnesses had a good opinion of him.

Now, I regret that these instructions have been so long, but we are now at the end, and I say to you in closing that each member of the jury is entitled to his or her own opinion. You should, however, exchange views with the

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other members of the jury, each with his fellow juror. That is the very essence of jury deliberation, to discuss and consider the evidence, to listen to the arguments of fellow jurors, to prevent your individual views, to consult with one another and to reach a verdict based solely and wholly on the evidence, if you can do so without any violence to our own individual judgment. Each of you must decide the case for himself or herself, but you should not hesitate to change an opinion which, after discussion with your fellow jurors, appears to be mistaken in the light of the evidence and of these instructions.

and the arguments of your fellow jurors you do entertain a conscientious conviction which differs from the others, you should not yield that conviction because you are outnumber or outvoted. Your final vote should reflect your conscientiou conviction as to how the issues should be decided.

Any verdict, members of the jury, must be unanimous; that is, as to each count the verdict must be unanimous.

Madam foreman, members of the jury, you as jurors
must not consider or in any way speculate about the punishment
which the defendant may receive if he is found guilty. Under
your oath as jurors you cannot allow a consideration of
punishment which may be imposed on the defendant if he is

convicted to influence your verdict or to enter in way into your discussions. The function of the jury is to determine the guilt or innocence of the defendant. It is the judge, the court, the court alone, which has the responsibility and the duty of letermining the sentence if there should be a conviction.

The charges here, ladies and gentlemen, are most serious. They are serious for the government, for the people of this country. They are equally serious for the defendant. The just determination of this case is important for both sides. If the government has failed to carry its burden of proof as to any count or counts, your sworn duty is to bring in a verdict of not guilty on such count or counts. If the government has carried its burden as to any count or counts as to this defendant, you must not flinch from your sworn duty, but you must bring in a verdict of guilty on such count or counts.

The guilt or innocence of the defendant is for you and you alone to determine. The government, to prevail, must prove the essential elements as I described them by the required degree of proof. If it succeeds, as I just just said, your verdict must be guilty. If it fails, your verdict must be not guilty. Each count of the indictment should be considered separately. Thus there are various

possible verdicts. You may find the defendant not guilty on each count, you may find him guilty on each count, or you may find him guilty on some count or counts and not guilty on others. I am not suggesting any of these alternatives to you. I am merely trying to make it crystal clear that you should consider and bring in a verdict on each count of the indictment separately.

I am going to give madam foreman a copy of the indictment, reminding you that an indictment is just a charge.

THE FOREMAN: One copy or copies?

madam foreman to be used simply as a guide for returning your verdict on each count as to the defendant. The form is not to be signed. It is only for your convenient use. Your verdict will be returned orally by the foreman in open court, and it goes without saying that the foreman is intended to or should not in any way influence your verdict.

If during your deliberations you wish to see any of the exhibits, the foreman should send out a note by the marshal. We will send the requested exhibits to you, likewise send a request through the marshal and your request will be considered, and if granted, arrangements will be made.

Now, we have reached that part of the trial when we must say goodbye to our alternate jurors. Mr. Scusing, with thanks I hope you realize you have served in a function just as valuable as if you participated in the deliberations to the jury. Trials are uncertain and of varying length, emergencies arise, jurors become sick. If we don't have alternates in such cases the trial has to stop and start all over again, with the duplication of time and expense involved. So we have alternate jurors. You are now excused and retire and take your things from the jury room so that the jury room will be vacated by the time the jury retires to deliberate.

(Alternate jurors excused)

THE COURT: I will ask the members of the jury to be patient and silent for just a few minutes while I see counsel at the side bar with the reporter.

(At the side bar)

THE COURT: Does the government have any exceptions

MR. SPEISER: No, your Honor.

THE COURT: Mr. Rosenthal?

MR. ROSENTHAL: Yes, I have a few, your Honor.

In the early part of your charge when you were explaining the SEC laws you mentioned misstatements. I was concerned that it might give the jury a false impression, though I

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light on this particular problem.

THE COURT: That is the mystery to me. Morgan, if I recollect it correctly, himself lost money because he owned stock of this company and, if I recollect it, his mother and perhaps his sister --

MR. ROSENTHAL: Both sisters, your Honor.

THE COURT: Both sisters, which is a rather unique situation in stock fraud cases. I mean, going out and making money by selling to strangers through fraudulent means is, of course, a thing that arouses indignation. Dut to find that the alleged defrauder himself, and his mother and sisters, suffered frankly puzzles me.

MR. EBERHARDT: The only thought that I can offer, and obviously it is an inference that I obviously draw from my objectivity in this case, is that it seems to me that Mr. Morgan as a holder and his relatives as holders of this particular stock could have gained from an increase

THE COURT: If the company had been able to keep itself alive as a result of the moneys that the sale of this stock brought in.

MR. EBERHARDT: Precisely.

THE COURT: That is a sensible suggestion. agree.

MR. EBERHARDT: Your Honor, I have no really

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Casey, a fellow employee of Van Alstyne Associates, introduce or had tickets he received from Mr. Morgan showing that 39,100 shares of Display Sciences stock were ordered and received.

Another example of Mr. Morgan's puffing and desire to make misstatements. In addition to the letter of intent situation and the calling up of Mr. Pincus in the middle of the night and telling him there is a Tulsa grand jury, he told Mr. Dell'Aglio on the phone, as Mr. Dell'Aglio testified, that there was an Oklahoma Mafia. Is there an Oklahoma Mafia? What did Mr. Morgan have to say to Mr. Dell'Aglio there is an Oklahoma Mafia? None whatsoever. Another example of his puffing and misstatements.

And Mr. Morgan seems to place heavy emphasis on the fact that he brought this whole case to the SEC. Why did he bring it to the Securities Exchange Commission and the government? Because he knew that he did something wrong. He didn't bring all the facts to the attention of the SEC. Did he tell the SEC that he knew the company was in receivership at the time he was selling the stock? Did he tell the SEC the fact that the letters which contained representations about the letter of intent were false? No, he didn't. He gave us his documents, he gave the SEC these documents but he didn't tell the SEC or the government that

impressed by your wife's letter, and you are fortunate in having a wife as you have. But Mrs. Morgan, who is here in court, should know that if the wife and children dictated the sentence, no person, no matter what offense was committed, would ever go to prison, because in certainly a very, very high percentage of the cases, well over seventy five percent, we have an innocent wife and children who are, in effect, suffering as much or more as the nominal defendant.

But that's just the nature of life and we can't change it. But these things are not disregarded, but they can't control the sentence.

Also one must have in mind that certainly a period of commitment is not required in your case so far as your own future is concerned. And if I were free to decide everything on the basis of my personal feelings, you would probably walk out a free man. But I'm not.

Remember, I'm a public servant and I'm obliged to express in this job what I conceive to be the public interest, not anything personal to me. I'm simply a spokesman for the community.

Also you have to bear in mind that I must assume the correctness of the jury verdict. I'm not at liberty to say it is doubtful. A jury has passed on it

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and, regardless of what I might have done or right not, I have to accept the jury's verdict as conclusive. And on that assumption I have to sentence you.

I've already said some of the things that puzzled me, and they do affor punishment: the involvement of yourself and your family in the investment. But, Mr. Morgan, I also remember, and I can't quite get over it, and perhaps the jury couldn't get over it, if I remember correctly the stock that was sold was sold at a time when the company was actually in receivership.

I'm prepared to assume that you said that you didn't know it, but evidently the jury concluded that you did, and of course that is a circumstance that is strongly inclined to guilt. But that isn't necessary to pursue because, regardless of what conclusion I might draw on the evidence, I emphasize that I have to accept the jury's verdict at this point.

And, finally, you have to recognize that there is always a necessity for as equal application of the law as possible, and you have undoubtedly seen reflected in discussions, philosophical debates and perhaps even in the press, the idea that offenses which could be characterized as white collar, or financial, are punished less severely than offenses committed by less privileged members of the